(1D)

No. 89-65-CFX
Status: GRANTED

Title: Fort Stewart Schools, Petitioner
v.
Federal Labor Relations Authority, et al.

Docketed:
July 14, 1989

Court: United States Court of Appeals
for the Eleventh Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Hirn,Richard J., Persina,William E.

Entry	Date	Note	Proceedings and Orders
1	May 8 1989	G	Application (A88-889) to extend the time to file a petition for a writ of certiorari from May 18, 1989 to July 17, 1989, submitted to Justice Kennedy.
2	May 11 1989		Application (A88-889) granted by Justice Kennedy extending the time to file until July 17, 1989.
3	Jul 14 1989	G	Petition for writ of certiorari filed.
5	Aug 1 1989		Order extending time to file brief of respondent on the merits until September 1, 1989.
6	Aug 1 1989		The above extension if for all respondents.
7	Aug 4 1989		Brief of respondent Ft. Stewart Assn. of Educators in opposition filed.
8	Sep 1 1989		Memorandum of respondent FLRA filed.
9	Sep 5 1989		DISTRIBUTED. September 25, 1989
10	Oct 2 1989		Petition GRANTED.
			**********
11	Oct 12 1989	G	Motion of the Acting Solicitor General to dispense with printing the joint appendix filed.
12	Oct 30 1989		Motion of the Acting Solicitor General to dispense with printing the joint appendix GRANTED.
13	Nov 8 1989		Record filed.
		*	Certified copy of original record and proceedings received.
14	Nov 16 1989		Brief of petitioner Ft. Stewart Schools filed.
15	Nov 27 1989		SET FOR ARGUMENT WEDNESDAY, JANUARY 10, 1990. (1ST CASE)
16	Dec 5 1989		CIRCULATED.
17	Dec 15 1989	X	Brief of respondent Fort Stewart Assn. of Educators filed.
18	Dec 18 1989	X	Brief of respondent Federal Labor Relations Authority filed.
19	Dec 18 1989	X	Brief amicus curiae of National Treasury Employees Union filed.
20	Dec 18 1989	X	Brief amici curiae of AFL-CIO, et al. filed.
21	Dec 29 1989	X	Reply brief of petitioner Ft. Stewart Schools filed.
23	Jan 10 1990		ARGUED.

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(1)

89-65

No.

In the Supreme Court of the United States

OCTOBER TERM, 1989

FORT STEWART SCHOOLS, PETITIONER

v.

FEDERAL LABOR RELATIONS AUTHORITY AND
FORT STEWART ASSOCIATION OF EDUCATORS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the wages and money-related fringe benefits of federal employees whose rate of compensation is not entirely fixed by statute are negotiable "conditions of employment" under 5 U.S.C. 7103(a).

2. Whether compensation-related proposals—such as the Union's proposal in this case to raise the salaries of employees at two schools for dependents of Army personnel by 13.5%—are non-negotiable because they interfere with an agency's management right under 5 U.S.C. 7106(a)(1) to set the agency's budget.

3. Whether the Union's proposals in this case are non-negotiable under 5 U.S.C. 7117 because they are "the subject of [an] agency rule or regulation" for which there is a "compelling need."

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In the Supreme Court of the United States

OCTOBER TERM, 1989

No.

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FEDERAL LABOR RELATIONS AUTHORITY AND
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The Acting Solicitor General, on behalf of the Fort Stewart Schools, petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra,* 1a-30a) is reported at 860 F.2d 396. The decision of the Federal Labor Relations Authority (App., *infra,* 31a-54a) is reported at 28 F.L.R.A. 547.

JURISDICTION

The judgment of the court of appeals was entered on November 21, 1988. A timely petition for rehearing was denied on February 17, 1989 (App., *infra,* 55a-56a). On May 11, 1989, Justice Kennedy extended the time for filing a petition for a writ of certiorari to and including July 17, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

A. *The Federal Service Labor-Management Relations Statute*

Section 7102 (5 U.S.C.) provides in relevant part:

Each employee shall have the right * * *

* * * * *

(2) to engage in collective bargaining with respect to conditions of employment through representatives chosen by employees under this chapter.

Section 7103 (5 U.S.C.) provides in relevant part:

(a) For the purpose of this chapter—

* * * * *

(14) "conditions of employment" means personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions, except that such term does not include policies, practices, and matters

* * * * *

(C) to the extent such matters are specifically provided for by Federal statute[.]

Section 7106(a)(1) (5 U.S.C.) provides:

(a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency—

(1) to determine the mission, budget, organization, number of employees, and internal security practices of the agency.

Section 7117 (5 U.S.C.) provides in relevant part:

(a)(1) Subject to paragraph (2) of this subsection, the duty to bargain in good faith shall, to the extent not inconsistent with any Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any rule or regulation only if the rule or regulation is not a Government-wide rule or regulation.

(2) The duty to bargain in good faith shall, to the extent not inconsistent with Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any agency rule or regulation referred to in paragraph (3) of this subsection only if the Authority has determined under subsection (b) of this section that no compelling need (as determined under regulations prescribed by the Authority) exists for the rule or regulation.

B. *The dependents schools statute and regulation*

Section 241 (20 U.S.C.) provides in relevant part:

(a) In the case of children who reside on Federal property—

* * * * *

the Secretary shall make such arrangements (other than arrangements with respect to the acquisition of land, the erection of facilities, interest, or debt service) as may be necessary to provide free public education for such children. * * * To the maximum extent practicable, the local educational agency, or the head of the Federal department or agency, with which any arrangement is made under this section, shall take such action as may be necessary to ensure that the education provided pursuant to such arrangement is comparable to free public education provided for children in comparable communities in the State, or,

in the case of education provided under this section outside the continental United States, Alaska, and Hawaii, comparable to free public education provided for children in the District of Columbia. For the purpose of providing such comparable education, personnel may be employed and the compensation, tenure, leave, hours of work, and other incidents of the employment relationship may be fixed without regard to the Civil Service Act and rules * * *.

* * * * *

(e) To the maximum extent practicable, the Secretary shall limit the total payments made pursuant to any such arrangement for educating children within the continental United States, Alaska, or Hawaii, to an amount per pupil which will not exceed the per pupil cost of free public education provided for children in comparable communities in the State. The Secretary shall limit the total payments made pursuant to any such arrangement for educating children outside the continental United States, Alaska, or Hawaii, to an amount per pupil which will not exceed the amount he determines to be necessary to provide education comparable to the free public education provided for children in the District of Columbia.

Army Reg. 352-3, 1-7 provides:

Comparison factors. Education provided pursuant to the provisions of Section 6 for children residing on Federal property will be considered comparable to free public education offered by selected communities of the State when the following factors are, to the maximum extent practicable, equal:

a. Qualifications of professional and nonprofessional personnel.

b. Pupil-teacher ratios.

c. Curriculum for grades offered, including kindergarten and summer school, if applicable.

d. Accreditation by State or other accrediting association.

e. Transportation services (student and support).

f. Length of regular and/or summer term(s).

g. Types and numbers of professional and nonprofessional positions.

h. Salary schedules.

i. Conditions of employment.

j. Instructional equipment and supplies.

STATEMENT

Fort Stewart, an Army base in Georgia, operates two elementary schools for dependents of military and civilian personnel. The Fort Stewart Association of Educators (the Union) is the bargaining representative for approximately 100 professional and nonprofessional employees of the Fort Stewart Schools. Unlike most federal employees, teachers and other personnel at dependents schools are not classified and paid under the "General Schedule" set forth at 5 U.S.C. 5332. Rather, the dependents schools statute, 20 U.S.C. 241(a), directs the Army to provide an education comparable to that provided at public schools in the State and states that "[f]or the purposes of providing such comparable education, * * * compensation * * * may be fixed without regard to the Civil Service Act and rules."

At issue here are three Union proposals relating to employee compensation, including a proposal (Proposal 2) that "the salary increase for all bargaining unit members will be 13.5%." App., *infra*, 2a n.2.[1] The Fort Stewart

[1] The other two proposals are quite lengthy and contain numerous subparts. Proposal 3 relates to the circumstances under which employees are provided paid and unpaid leave. Proposal 1 addresses a

Schools declined to bargain over the proposals, contending that they are not negotiable under Title VII of the Civil Service Reform Act of 1978, 5 U.S.C. 7101 *et seq.*, known as the Federal Service Labor-Management Relations Statute (the Statute). The Federal Labor Relations Authority rejected this contention, and its conclusion that the proposals are negotiable was upheld by the Eleventh Circuit.

1. The Statute provides a "comprehensive * * * scheme governing labor relations between federal agencies and their employees." *Bureau of Alcohol, Tobacco and Firearms* v. *FLRA*, 464 U.S. 89, 91 (1983). Among other things, the Statute expressly recognizes the right of federal employees to form and join unions (see, *e.g.*, 5 U.S.C. 7102), and imposes upon management officials of federal agencies a general duty to bargain with their employees' unions over "conditions of employment." See *FLRA* v. *Aberdeen Proving Ground, Department of the Army*, 108 S. Ct. 1261 (1988); *Bureau of Alcohol, Tobacco and Firearms* v. *FLRA*, 464 U.S. at 92; 5 U.S.C. 7103(a)(12), 7114, 7116(a)(5), 7117.

The Statute provides that if, during bargaining, management officials decline to negotiate over a particular proposal submitted by a union, believing "that the duty to bargain in good faith does not extend to [such] matter" (5 U.S.C. 7117(c)(1)), the union may file a negotiability appeal with the Federal Labor Relations Authority. See 5 U.S.C. 7105(a)(2)(E), 7117(c). The FLRA's rulings on negotiability are reviewable in the courts of appeals. See 5 U.S.C. 7123.

In contrast to the National Labor Relations Act, a decision that a particular proposal is negotiable under the

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variety of subjects, including such matters as summer school salaries and reimbursement for use of personal vehicles for school business. App., *infra*, 21a-30a.

Statute does more than simply require the parties to bargain in good faith. If negotiations reach an impasse, "either party may request the Federal Service Impasses Panel to consider the matter" (5 U.S.C. 7119(b)(1)), and the Panel may resolve the dispute by ordering the incorporation of the contested proposal into the collective bargaining agreement. 5 U.S.C. 7119(c)(5)(B)(iii); see *National Federation of Federal Employees* v. *FLRA*, 789 F.2d 944, 945 (D.C. Cir. 1986).

2. The Army contended that the proposals at issue were non-negotiable for three reasons. First, it argued that proposals relating to employee compensation do not concern "conditions of employment" since the Statute limits the definition of that phrase to "personnel policies, practices, and matters * * * affecting working conditions."

Second, the Army argued that the proposals were non-negotiable under the "management rights" provision of the Statute (5 U.S.C. 7106), a provision that further limits the scope of negotiations. As relevant to this case, that provision states that "nothing in this chapter shall affect the authority of any management official of any agency—(1) to determine the * * * budget * * * of the agency." The Army claimed that the proposals at issue—particularly the proposal to raise employees' salaries by 13.5%—would interfere with its right to determine its budget.

Third, the Army relied on a provision of the Statute (5 U.S.C. 7117) stating that the duty to bargain does not extend to proposals that are "inconsistent with any Federal law or any Government-wide rule or regulation" (5 U.S.C. 7117(a)(1)), and that the duty to bargain extends to proposals that are "the subject of any agency rule or regulation * * * only if the Authority has determined * * * that no compelling need (as determined under regulations prescribed by the Authority) exists for the rule or regulation" (5 U.S.C. 7117(a)(2)). Another law, the dependents

schools statute (20 U.S.C. 241(e)) provides that "[t]o the maximum extent practicable," expenditures at dependents schools should be limited "to an amount per pupil which will not exceed the per pupil cost of free public education provided for children in comparable communities in the State." In implementing that law, the Army has provided by regulation that, "to the maximum extent practicable," salary schedules at dependents schools should be the same as salary schedules at comparable public schools in the State. Army Reg. 352-3, 1-7(h). The Army contended that the proposals at issue conflicted with Section 241 and its implementing regulation, and declined to negotiate for that reason as well.

3. With the exception of three minor subparts of the proposals, the FLRA rejected the Army's arguments.[2] The FLRA first noted that it had previously rejected the argument that compensation is not a negotiable "condition[ ] of employment." App., *infra*, 35a. It next held that the Army had not established that the Union's proposals would infringe on the Army's right to determine its budget because the Army had not shown that the inclusion of any or all of the proposals in the collective bargaining agreement would "result in significant and unavoidable in-

[2] The FLRA held that two of the 15 subparts of Proposal 1 were not negotiable because they were inconsistent with federal law. (Subparts L and M propose that the schools provide free health and life insurance, but federal law limits the amount the schools may contribute toward health insurance and specifically requires union members to contribute toward life insurance. The FLRA therefore held those subparts non-negotiable under Section 7117(a)(1). App., *infra*, 41a. The FLRA also held that Section F of Proposal 3, which proposed that leave without pay "may be approved at the discretion of the immediate supervisor," was not negotiable. It concluded that the subpart infringed on management's reserved right under Section 7106(a)(2)(B) to assign work. App., *infra*, 44a.

creases in cost not affected by compensating benefits." *Id.* at 37a. Finally, relying on its prior cases involving teachers at dependents schools, the FLRA held that Section 241 does not require that employees' salaries be set by comparison with salaries at state public schools and that the Army's regulation to that effect is not justified by a "compelling need." App., *infra*, 40a-41a. The FLRA accordingly ordered the schools to negotiate with the Union over the three proposals.

Chairman Calhoun dissented. Referring to his conclusion in a prior case, he stated: "[I]n the absence of a clear expression of congressional intent to make wages and money-related fringe benefits negotiable, I would find that these matters are not within the duty to bargain." App., *infra*, 46a.

4. The Eleventh Circuit affirmed. App., *infra*, 1a-30a. It first deferred to the FLRA's conclusion that compensation-related proposals are generally negotiable where employees are not subject to the General Schedule. Although the Statute defines negotiable "conditions of employment" as "personnel policies, practices and matters * * * affecting working conditions" (5 U.S.C. 7103(a)(14)), the court concluded that "[t]his definition alone does not exclude compensation and fringe benefits." App., *infra*, 7a. Turning to the numerous statements in the legislative history that compensation would not be negotiable under the Statute, the court dismissed them on the ground that the statements were made "with the understanding that Congress generally regulates such matters." *Id.* at 10a. The court acknowledged (*id.* at 9a) the decision of the Third Circuit holding that compensation is not a negotiable "condition[ ] of employment" (*Department of the Navy, Military Sealift Command* v. *FLRA*, 836 F.2d 1409 (1988)), but stated that it agreed with the Second Circuit's

contrary conclusion in *West Point Elementary School Teachers Association* v. *FLRA*, 855 F.2d 936 (1988).

The court gave three reasons for agreeing with the Second Circuit that such proposals do not interfere with the Army's right to determine its budget. First, the court said that "[t]he proposals would not necessarily increase the Army's costs" (App., *infra*, 20a), although it did not explain how a 13.5% increase in salaries could fail to increase costs. Second, the court stated that "any increase in the employees' salaries would not significantly increase the Army's budget," which "includes bases, troops, weapons, vehicles, other equipment, salaries for all other officers, and expenses for its eight other schools." *Ibid.* Third, the court said that the Army had failed to establish "that no compensating benefits would offset such costs even if its costs increased." *Ibid.*

The court also agreed with the Second Circuit that the proposals were not precluded by Section 241 of the dependents schools statute or the Army's implementing regulation. The court recognized that "Section 241 requires that the Army 'to the maximum extent practicable' provide a comparable education to local public schools at a cost per pupil not exceeding the per pupil cost of free public education in local communities." App., *infra*, 13a. However, the court concluded, the Army could maintain cost parity and educational comparability despite wide variations in teachers' salaries. "For example, books, building maintenance, athletic programs, clubs, and lunch services also enter into this calculation." *Id.* at 19a. For that reason, the court found that there was no "compelling need" for the Army's regulation providing that employees' salaries must be set by comparison with those at comparable public schools.

REASONS FOR GRANTING THE PETITION

Review is warranted because the court below incorrectly decided an issue of considerable importance to the federal government, and the issue is one on which the courts of appeals are in conflict.

1. There are "forty-odd federal pay systems which are not entirely fixed by statute." *Department of Defense Dependents Schools* v. *FLRA*, 863 F.2d 988, 989 (D.C. Cir. 1988), reh'g en banc granted (Feb. 6, 1989). Disputes involving employees of the Army's domestic dependents schools have spawned decisions by the Second Circuit (*West Point*), the Fourth Circuit (*United States Department of Defense Dependent Schools, Fort Bragg* v. *FLRA*, 838 F.2d 129, 130 (4th Cir. 1988) (vacated)), and the Sixth Circuit (*Fort Knox Dependent Schools* v. *FLRA*, No. 87-3395 (May 11, 1989), petition for reh'g en banc pending (filed June 23, 1989). In addition, the courts of appeals have considered cases involving teachers at overseas dependents schools (*Department of Defense Dependents Schools*), which are governed by a different statute (20 U.S.C. 902) from that governing domestic schools; civilian mariners employed by the Navy (*Military Sealift Command*), whose pay, under 5 U.S.C. 5348, is set by comparison with mariners employed by private vessels; electricians employed by the Bureau of Engraving and Printing (*Department of the Treasury, Bureau of Engraving and Printing* v. *FLRA*, 838 F.2d 1341 (D.C. Cir. 1988)), who are "prevailing rate employees" governed by 5 U.S.C. 5349(a); and employees of the Nuclear Regulatory Commission (*Nuclear Regulatory Commission* v. *FLRA*, 859 F.2d 302 (4th Cir. 1988), reh'g en banc granted (Jan. 6, 1989)), who are excepted from the General Schedule by 42 U.S.C. 2201(d). As these cases illustrate, the forty-odd categories of federal employees affected by the questions

presented here involve a large and diverse group. Whether they may negotiate over the amount of compensation (wages and money-related fringe benefits) they receive is a question of great importance to the employees and their agencies.

The courts of appeals are split as to the first question presented—whether compensation is a negotiable "condition[ ] of employment." The Third Circuit (*Military Sealift Command*), the Sixth Circuit (*Fort Knox*), and the District of Columbia Circuit (*Department of Defense Dependents Schools*) have held that compensation is not negotiable. The Second Circuit (*West Point*) and the Fourth Circuit (*Nuclear Regulatory Commission*),[3] as well as the court below, have held that compensation is negotiable. The conflict is express: the court below acknowledged its disagreement with the Third Circuit (App., *infra,* 9a); the District of Columbia Circuit noted that it was "fully aware of contrary decisions" by the court below, the Third Circuit, and the Fourth Circuit (863 F.2d at 994 n.12); and the Sixth Circuit cited the decisions of the three circuits that have upheld the FLRA (including the decision here) while it followed the other two (slip op. 6-7). Although rehearing en banc has been granted by the District of Columbia and Fourth Circuits, and a petition for rehearing is pending in the Sixth Circuit, the conflict can only be resolved by this Court, since the Third Circuit disagrees with both the Second Circuit and the court below and the decisions of all three circuits are final.

There is no express conflict on the question whether compensation-related proposals conflict with management's right to control its budget. The Second Circuit and

[3] Under the Fourth Circuit's rules, the panel decision in *Nuclear Regulatory Commission* was vacated when rehearing en banc was granted.

the court below have upheld the FLRA's position that pay is almost always negotiable despite the management rights provision, while the three courts holding that pay is not a negotiable "condition[ ] of employment" did not reach the issue. This question should be considered by this Court because it is closely related to the first question presented: the budget control clause of the management rights provision reinforces the view that Congress did not intend compensation-related proposals to be negotiable. Moreover, if the Court concludes that compensation is a negotiable "condition[ ] of employment," then a decision is needed with respect to the management rights issue in order to resolve the dispute in this case and all of the related cases.

The third question presented also warrants consideration by this Court. There is a direct conflict on this question—whether there is a "compelling need" for the Army regulation providing that compensation rates at dependents schools are to be set by comparison with rates at comparable public schools. Like the court below, the Second Circuit in *West Point* (855 F.2d at 942-943) has agreed with the FLRA, while the Sixth Circuit held to the contrary in *Fort Knox,* expressly disagreeing with the decision below and the decision in *West Point* (slip op. 6-7).[4]

In addition, most of the cases raising the question whether compensation is a negotiable "condition[ ] of employment" involve statutes providing that pay rates are to be set by comparison with some other group of employees. See, *e.g., Military Sealift Command* (Navy civilian mariners' pay rates are set by comparison with rates paid private mariners under 5 U.S.C. 5348); *Bureau of Engrav-*

[4] As the Sixth Circuit noted (slip op. 7), the Fourth Circuit in *Fort Bragg,* in a decision that was subsequently vacated as moot, also held that, under Section 241, there is a "compelling need" for the Army's regulation.

ing and Printing (electricians are "prevailing rate employees" under 5 U.S.C. 5349(a)); *Department of Defense Dependents Schools* (overseas teachers' salaries are set by comparison with salaries at large urban school districts under 20 U.S.C. 902). The FLRA's approach has been to hold that since each of these statutes grants the agency involved some discretion, virtually any proposal relating to compensation is subject to negotiation. In our view, however, Congress's direction that compensation be set on the basis of a comparison with other rates of pay is not consistent with such a broad view of negotiability.

Thus, if this Court does not agree with us on the proper disposition of the first and second questions presented, it would need to reach the third question in order to resolve this dispute; moreover, disposition of that question would also resolve a direct conflict in the circuits and would provide guidance in many other cases. Accordingly, review is warranted with respect to all three questions presented.[5]

2. The court of appeals decided each of the three questions in this case incorrectly.

a. Congress extended collective bargaining in the federal sector only to "conditions of employment" (5 U.S.C. 7102(2)), which it defined as "personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions." 5 U.S.C. 7103(a)(14). Although the FLRA's interpretation

[5] In *Fort Knox*, the dissenting judge noted (slip op. 13 n.3) that Congress in 1985 directed the Army to submit, by March 1, 1986, a plan to transfer the domestic dependents schools to the local school districts of the States in which the schools are located. Act of Dec. 3, 1985, Pub. L. No. 99-167, § 824, 99 Stat. 992. However, the Army found that the States were not anxious to operate the schools, and, instead of submitting a plan to transfer the schools, the Army submitted a letter to Congress explaining its finding. Thus, there is no current plan to transfer the schools to the States.

of the Statute is entitled to deference if that interpretation is a reasonable reading of an ambiguous provision, a "straightforward, natural reading of the statutory language fails to yield the FLRA's interpretation, namely that 'working conditions' should be read to include 'wages.' Far from it. The term 'working conditions' ordinarily calls to mind the day-to-day circumstances under which an employee performs his or her job. Thus, for example, [the District of Columbia Circuit] has upheld the FLRA's conclusion that matters relating to job safety and office environment are 'central' to an employee's working conditions. However, it is entirely unclear how an employee's compensation can be seen as 'affecting' such working conditions." *Department of Defense Dependents Schools*, 863 F.2d at 990 (citation omitted).[6] Compensation is properly viewed as a "term" of employment rather than a "condition" of employment, and the Statute does not make "terms of employment" negotiable.

Moreover, because matters of compensation are typically at the core of collective bargaining in the private sector, one would expect that any congressional purpose to include that subject within the scope of collective bargaining in the federal sector would be clearly expressed. But no such expression can be found. Thus, the Statute stands in striking contrast with the two instances where Congress did make clear its intent to permit federal employees to bargain over compensation. First, the Postal Reorganiza-

[6] As the District of Columbia Circuit stated in that case, "[D]eference is, of course appropriate in a *Chevron* Step Two analysis, where the issue would be whether the FLRA's interpretation of its own statute is reasonable; but deference is not the correct analytic mode under *Chevron* Step One, where our task is to assess independently the evidence of Congressional intent." 863 F.2d at 994 n.12. (The court's reference was to *Chevron U.S.A.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 & n.9 (1984).)

tion Act grants to postal workers the right to bargain over "wages, hours, and working conditions." 39 U.S.C. 120 note. By referring separately to "wages" and "working conditions," Congress showed that it does not consider the latter to include the former.[7]

Second, Section 704 of the Civil Service Reform Act of 1978, 5 U.S.C. 5343 note, provides in subsection (a) that "prevailing rate employees" who bargained over wages and other matters prior to August 19, 1972, may continue to bargain over "terms and conditions of employment," and in subsection (b) that the "pay and pay practices" subject to negotiation under the provision are to be negotiated in accordance with current prevailing practices. If, as the FLRA has held, the Federal Service Labor-Management Relations Statute confers on federal employees who are to be paid according to prevailing practices a general right to bargain about wages, Congress did not need to enact Section 704 in order to create a special rule allowing negotiation by workers in bargaining units that had negotiated over wages prior to August 19, 1972.

The legislative history of the Statute "is replete * * * with indications that Congress did not intend to subject pay of federal employees to bargaining." *Military Sealift*

[7] Similarly, the National Labor Relations Act (NLRA), 29 U.S.C. 158(d), separates "wages" from "working conditions" in making "wages, hours, and other terms and conditions of employment" negotiable. The court below noted that the NLRA refers to *other* conditions of employment, and concluded that the language of Section 158(d) supports the FLRA's conclusion that compensation is a "condition[ ] of employment." App., *infra*, 8a. However, the NLRA refers to "other *terms* and conditions of employment" (emphasis added). We agree with the District of Columbia Circuit that "other terms * * * of employment" refers back to "wages," while "other * * * conditions of employment" refers back to "hours." See *Department of Defense Dependents Schools*, 863 F.2d at 991 n.3.

Command, 836 F.2d at 1417. Representative Ford had proposed a bill which would have provided for "the negotiation of pay and other major money-related fringe benefits." See 124 Cong. Rec. 25,721 (1978) (discussing H.R. 9094). And Representative Heftel, during the House Committee markup of the federal labor statute, introduced a proposal that would have extended the obligation to negotiate to "pay practices" and "overtime practices" so far as "consonant with law and regulation." House Comm. on Post Office and Civil Service, Subcomm. on Postal Personnel and Modernization, 96th Cong., 1st Sess., *Legislative History of the Federal Service Labor-Management Relations Statute* 1087-1088 (1979) (proposing new Section 7115(b)). "Neither proposal was adopted, a fact of no little interpretive significance." *Department of Defense Dependents Schools*, 863 F.2d at 992 (citing *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 442-443 (1987)).

In addition, both the Senate and House Committee reports state unequivocally that the federal labor statute does not provide for "bargaining on wages or fringe benefits." H.R. Rep. No. 1403, 95th Cong., 2d Sess. 12 (1978); see also S. Rep. No. 969, 95th Cong., 2d Sess. 13 (1978). Furthermore, every legislator who addressed the issue of compensation—and there were several (see, *e.g.*, 124 Cong. Rec. 25,716 (1978) (remarks of Rep. Udall); *id.* at 29,182 (remarks of Rep. Udall); *id.* at 24,286; *id.* at 25,720 (remarks of Rep. Clay); *id.* at 25,721 (remarks of Rep. Ford); *id.* at 29,188 (remarks of Rep. Derwinski); *id.* at 27,549 (remarks of Sen. Sasser))—stated that it was not negotiable. There is not a single statement in the entire legislative history to the effect that compensation fell within the general bargaining duty established by the federal labor statute.[8]

[8] In reaching its conclusion, the court below relied heavily on a statement of Congressman Clay that when a statute merely vests dis-

The court of appeals suggested that Congress ratified two decisions of the FLRA's predecessor, the Federal Labor Relations Council, which supported the proposition that federal employees may negotiate over wages not specifically set by statute. App., *infra,* 12a-13a. The District of Columbia Circuit explained why those decisions do not compel affirmance of the FLRA's conclusion: "Although we will normally presume that Congress intends to continue the interpretation accorded to a prior statute when it substantially re-enacts that law, such a presumption is plainly inapposite in a situation, such as the case at hand, where Congress has clearly expressed its intent to the contrary." *Department of Defense Dependents Schools,* 863 F.2d at 993 n.9. Indeed, "[m]ore than that, logic indicates that Congress would not leave to various federal agencies the authority to expand the budgets and fiscal limitations placed upon those agencies by requiring them to bargain about increases in pay and fringe benefits once budget boundaries were set by the Congress. It is obvious that salary and fringe benefits are the items most likely to involve substantial overspending if left to collective bargaining, particularly with respect to a school system for minor dependents of United States military and civilian personnel." *Fort Knox,* slip op. 5.

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cretionary authority over a matter with a particular official, the matter is subject to bargaining. App., *infra,* 11a (quoting 124 Cong. Rec. H9638 (daily ed. Sept. 13, 1978)). That statement did not address the question of compensation. When Representative Clay did address that question, he twice "assure[d] [his] colleagues that there is nothing in th[e federal labor statute] which allows Federal employees the right to * * * negotiate over pay and money-related fringe benefits." 124 Cong. Rec. 25,720 (1978); see also *id.* at 24,286 (remarks of Rep. Clay). To read Congressman Clay's general statement as supporting the court of appeals' position thus "puts Congressman Clay at war with himself over the issue." *Military Sealift Command,* 836 F.2d at 1418.

b. The court of appeals also erred in holding that the proposals at issue do not infringe on the Army's right to control its budget. The FLRA's test of negotiability under the budget control clause of the management rights provision (Section 7106(a)(1)) requires an agency to "make a substantial showing that the proposal requires the inclusion of a particular program or amount in its budget or that the proposal will result in significant and unavoidable increases in cost not affected by compensating benefits." App., *infra,* 36a. The Army should be held to have satisfied that test simply by showing that the Union proposed a 13.5% pay raise for all employees. Yet the court of appeals found that showing insufficient on three grounds, none of which should be sustained.

First, the court suggested that the Army had failed to show that the proposals would "necessarily increase [its] costs." App., *infra,* 20a. That observation overlooks the obvious fact that salaries are a major component of any school budget and that a 13.5% increase in salaries would have to increase costs.

Second, the court suggested that any increase in costs would not be significant. It reached that conclusion only by comparing the increase in the cost of operating the dependents schools to the Army's budget as a whole, including its budget for armaments. App., *infra,* 20a. That approach is plainly flawed. Whether a proposal will cause a significant increase in costs should be tested by comparison with the costs of the program employing the bargaining unit employees, not the entire agency budget. Otherwise, virtually no proposal could be found to be "significant." That is certainly the case with respect to the dependents schools operated by the Army. Given the size of the Army's share of the defense budget, any proposal involving dependents schools could only amount to a tiny percentage of the Army's total expenditures.

Finally, the court stated that the Army had failed to establish that any increase in costs resulting from the proposals would not be offset by "compensating benefits." App., *infra,* 20a. As an initial matter, it is not clear what compensating economic benefits might flow from a flat across-the-board salary increase. Moreover, the requirement of such a showing is contrary to the Statute. The quintessential decision that any entity, be it a federal agency or a private party, makes when crafting a budget is whether the benefits that flow from a given action exceed its costs. See Exec. Order No. 12,291, 3 C.F.R. 127 (1982) (requiring cost-benefit analysis for agency actions). A budget is, in essence, a series of decisions designed to maximize the benefits obtained from spending a discrete amount of money. To say that agency management has the right to determine the agency's budget is to say that it is up to management, and management alone, to determine the best allocation of the agency's resources.

c. The court of appeals also erred in concluding that there is no "compelling need" for the Army's regulation (Army Reg. 352-3, 1-7) requiring that salaries be set by comparison with salaries at public schools. The court correctly noted that because Section 241 is not part of the Federal Service Labor-Management Relations Statute, the FLRA's construction of that provision is not entitled to deference. App., *infra,* 13a. However, the court erred in failing to defer to the Army's reasonable construction of the dependents schools statute. See *Fort Knox,* slip op. 6-7.

Under Section 241(a), the Army must "take such action as may be necessary to ensure that the education provided * * * is comparable to free public education provided for children in comparable communities in the State * * *, [and] [f]or the purpose of providing such comparable education, personnel may be employed and the compensation * * * fixed without regard to the Civil Service Act and rules." In addition, Section 241(e) provides that, "[t]o the maximum extent practicable," the Army "shall limit the total payments made pursuant to any such arrangement for educating children * * * to an amount per pupil which will not exceed the per pupil cost of free public education provided for children in comparable communities in the State." The Army in its regulation has reasonably interpreted Congress's mandate to require that the various components of an educational system listed in its regulation—including both salary schedules and such items as pupil-teacher ratios, transportation services, and instructional equipment and supplies—shall be modeled on those of comparable public schools. Indeed, it is difficult to conceive how the Army could implement Section 241 without modeling each major component of dependents schools on state public schools.

The court of appeals' suggestion that the Army could comply with Section 241 while paying salaries significantly in excess of those paid at public schools (App., *infra,* 18a-19a) is fanciful. Suppose, for example, that a dependents school made major increases in pupil-teacher ratios in order to maintain the level of per-pupil costs despite a large salary increase (such as a 13.5% increase), and the parents of children at the schools charged that the Army had violated Section 241(a) by failing to provide an education "comparable to free public education provided for children in comparable communities in the State." The Army would surely not be able to defend, say, a 40-1 student teacher ratio, when comparable public schools had a 20-1 ratio, by showing that it was paying its teachers more than the going rate.

The 13.5% increase and other money-related requests proposed here—proposals not even purporting to be based on practices at public schools in comparable commu-

nities—are contrary to both the regulation and the mandate of Section 241 and are therefore non-negotiable.[9] Indeed, the direct violation of Section 241 that such proposals would entail is itself demonstrative of the "compelling need" for the regulation.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JULY 1989

[9] Chairman Calhoun noted in his dissent from the FLRA's decision (App., *infra*, 46a) that Subproposals A and D of the first proposal (which appear to be contrary to the request for a 13.5% salary increase in the second proposal) seem to assume that management will set salaries by comparison with public school salaries. By those proposals, the Union appears only to ask for information concerning the data the Army collects and for consultation with management concerning salaries. As Chairman Calhoun concluded, those proposals are not objectionable.

* The Solicitor General is disqualified in this case.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 87-8734

FORT STEWART SCHOOLS, PETITIONER, CROSS-RESPONDENT

v.

FEDERAL LABOR RELATIONS AUTHORITY, RESPONDENT, CROSS-PETITIONER

Fort Stewart Association of Educators, Intervenor

NOV. 21, 1988

Before: VANCE and HATCHETT, Circuit Judges, and NESBITT*, District Judge.

HATCHETT, Circuit Judge:

Fort Stewart Schools (Army) seeks review of a Federal Labor Relations Authority (FLRA) decision and order requiring it to negotiate three proposals with the Fort Stewart Association for Educators (Union). The FLRA and the Union cross-petition this court to enforce the FLRA's decision and order. For the reasons discussed below, we grant the FLRA's and Union's petition to enforce the FLRA's order and deny the Army's petition for review.

* Honorable Lenore C. Nesbitt, U.S. District Judge for the Southern District of Florida, sitting by designation.

FACTS

The Army operates two elementary schools for military and civilian personnel's dependents (dependents schools) at Fort Stewart, Georgia. *See* 20 U.S.C. § 241 (1974 & Supp.1988) (Secretary of Education authorized to make arrangements with federal agencies to operate schools under certain circumstances). The schools provide free public education for military and civilian personnel's children who reside on the federal property. The Union, an affiliate of the National Education Association, acts as the collective bargaining representative for the schools' ninety-nine teachers and other employees.

During contract negotiations with the Army, the Union submitted three proposals for bargaining. The first proposal included sections which set mileage reimbursement, mandated certain insurance programs, and gave the Union the right to review and comment on salary schedules.[1] The second proposal suggested a fixed salary increase of 13.5-percent for the teachers and other employees for the subsequent school year.[2] The third proposal detailed various leave practices such as personal leave, sick leave, professional leave, maternity leave, and leave without pay.[3] The Army refused to negotiate these three proposals, contending that the proposals did not involve mandatory bargaining matters.

PROCEDURAL HISTORY

The Union filed a negotiability appeal with the FLRA seeking a determination that each proposal involved a

[1] See Appendix A.

[2] Proposal 2.

The Association and the Employer agree that the salary increase for all bargaining unit members will be 13.5% for the school year.

[3] See Appendix B.

mandatory bargaining subject. *See* 5 U.S.C. § 7117(c) (1980). The FLRA agreed with the Union and ordered the Army to negotiate the three proposals with the Union.[4]

In reaching its decision, the FLRA rejected all the Army's contentions. First, the FLRA dismissed the Army's contention that the proposals do not concern conditions of employment. The FLRA reiterated its prior conclusion that the Federal Service Labor-Management Relations Act (FSLMRA) does not preclude all bargaining over employee compensation. 5 U.S.C. §§ 7101-7135 (1980). *See Fort Bragg Unit of N.C. Assoc. of Educators, Nat'l. Educ. Assoc. and Fort Bragg Dependents Schools, Fort Bragg, N.C.*, 12 F.L.R.A. 519 (1983) (WESTLAW FLB-FLRA database) (Congress did not intend to exclude dependents schools' employees' compensation and related benefits from negotiable conditions of employment in the FSLMRA). Furthermore, the FLRA found that the proposals involved "conditions of employment" because "the matters proposed are not specifically provided for by law and are within the discretion of the [Army]; and . . . the proposals are not otherwise inconsistent with law, applicable government-wide rule or regulation, or with an [Army] regulation supported by a compelling need."[5] *American Federation of Government Employees; AFL-CIO, Local 1897 and Dept. of the Air Force, Eglin Air Force Base, Florida*, 24 F.L.R.A. (No. 41) 377 (1986) (WESTLAW FLB-FLRA database). Chairman Calhoun dissented, however, claiming that the duty to bargain does

[4] The FLRA excluded three sections from its order: Sections L and M of Proposal 1 and Section F of Proposal 3. The FLRA held that these sections involved nonnegotiable matters.

[5] Alternatively, the FLRA concluded that even if the Army properly refrained from negotiating the compensation matters, it still had a duty to negotiate Sections A, C, and D of Proposal 1 because they did not involve compensation.

not encompass proposals concerning wages and money-related fringe benefits absent a clear congressional intent to make such matters negotiable.

The FLRA also held that the proposals did not interfere with the Army's right to determine its budget. The FLRA concluded that the Army failed to show that the proposals would significantly and unavoidably increase the Army's costs without producing compensating benefits to offset the alleged costs. *See American Federal* [*sic*] *of Gov't Employees, AFL-CIO and Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio,* 2 F.L.R.A. (No. 77) 604 (1980) (WESTLAW FLB-FLRA database), *enforced as to other matters sub nom. Dep't of the Air Force v. FLRA,* 659 F.2d 1140 (D.C.Cir.1981), *cert. denied sub nom., AFGE v. FLRA,* 455 U.S. 945, 102 S.Ct. 1443, 71 L.Ed.2d 658 (1982) (interference with the right to set a budget requires prescribing particular programs or amount allocated for such programs, or causing inevitable significant cost increases without any offsetting benefits).

The FLRA rejected the Army's contention that bargaining over compensation violates other federal laws. First, the FLRA determined that the proposals do not conflict with laws that regulate the solicitation of contract bids in the procurement process. The procurement laws mandate that federal agencies award contracts for professional services through competitive bidding. 10 U.S.C. § 2304 (1983 & Supp.1988). The FLRA noted that it previously dismissed this same claim because procurement law does not govern teachers and employees in the dependents school system. *See Fort Knox Teachers Assoc. and Board of Educ. of the Fort Knox Dependent Schools,* 27 F.L.R.A. (No. 34) 203 (1987) (WESTLAW FLB-FLRA database) (dependent school teachers and employees are federal government employees rather than independent contrac-

tors making procurement laws inapplicable to them). Second, the FLRA concluded that the proposals do not violate the Anti-Deficiency Act. The Anti-Deficiency Act prohibits an agency from obligating itself to pay money before Congress appropriates funds. 31 U.S.C. § 1341 (1983). Although the proposals obligate the Army to spend funds for salaries in the succeeding fiscal year, the FLRA noted that the Army's obligation accrues only when the employees earn the salaries. *Fort Knox Dependent Schools,* 27 F.L.R.A. at 217. Therefore, the government will appropriate funds before the Army incurs these obligations.

Finally, the FLRA ruled that the Army did not establish a compelling need for its regulation that requires it to pay dependents schools' employees a comparable salary to local public school employees. The FLRA, relying on a prior decision, held that "nothing in either [20 U.S.C. § 241] or its legislative history persuades us that Congress intended to restrict the [Army's] discretion as to the particular employment practices which could be adopted." *See Fort Knox Teachers Assoc.,* 27 F.L.R.A. at 216 (comparable education requirement in section 241 does not mandate comparable compensation). Consequently, the FLRA concluded that the Army failed to demonstrate a compelling need for its regulation. Moreover, the FLRA concluded that even if a compelling need existed, the Army did not show that Sections A through G, and I and J, of Proposal 1 conflicted with the Army's regulation.

The Army brought this petition for review of the FLRA's decision and order pursuant to the FSLMRA. *See* 5 U.S.C. § 7123(a) (1980). In response, the FLRA and the Union cross-petitioned for enforcement of the FLRA's order. *See* 5 U.S.C. § 7123(b) (1980).

ISSUES

The Army petitions for review of the following issues: (1) Whether the Army has a statutory duty to bargain because the Union's proposals involve "conditions of employment" within the Army's discretion; (2) whether the Army established a compelling need for its regulation that mandates equality of compensation between employees in dependents schools and local public schools; and (3) whether the Union's proposals interfere with the Army's right to determine its own budget.

DISCUSSION

A. *Conditions of Employment*

The FSLMRA gives federal employees the right to negotiate over "conditions of employment." 5 U.S.C. § 7102(2) (1980). Conditions of employment include "personnel policies, practices, and matters, whether established by rule or regulation, or otherwise, affecting working conditions. . . ." 5 U.S.C. § 7103(a)(14) (1980). Despite this broad definition, Congress has imposed two limits on the scope of the duty to bargain. First, the term "conditions of employment" excludes any matters "specifically provided for by Federal Statute." 5 U.S.C. § 7103(a)(14)(C) (1980). Second, the duty to bargain excludes matters that conflict with "any Federal law or Government-wide rule or regulation," or any agency regulation for which a compelling need exists. 5 U.S.C. § 7117(a)(2) (1980).

The Army contends that "conditions of employment" in the FSLMRA do not include wages and money-related benefits. The Army further contends that even if the term "conditions of employment" is ambiguous, the Union's proposals conflict with federal law, excluding them from

the statutory duty to bargain. The Union and the FLRA contend that the Army has a duty to negotiate the Union's proposal because the proposals involve conditions of employment within the Army's discretion.

1. Congressional Intent: FSLMRA's Language and Legislative History

Relying on prior decisions, the FLRA determined that the FSLMRA does not prohibit bargaining over compensation and fringe benefits under the following conditions: the agency has discretion over such matters; Congress has not specifically provided for these matters; and the proposals do not conflict with law, government-wide rule or regulation, or an agency regulation for which a compelling need exists. *Fort Knox Teachers Assoc. and Fort Knox Dependents Schools,* 28 F.L.R.A. (No. 29) 179 (1987) (WESTLAW, FLB-FLRA Database). Because this FLRA decision is within its authority, we must defer to its conclusion unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2) (1977); *West Point Elementary School Teachers Assoc. v. FLRA,* 855 F.2d 936, 939-40 (2d Cir.1988); *see Library of Congress v. FLRA,* 699 F.2d 1280, 1289 (D.C.Cir.1983) ("Congress has specifically entrusted the [FLRA] with the responsibility to define the proper subjects for collective bargaining [under the FSLMRA], drawing upon its expertise and understanding of the special needs of the public sector labor relations.")

Our examination of the FSLMRA and its legislative history supports the FLRA's conclusion. The FSLMRA defines conditions of employment as "personnel policies, practices and matters . . . affecting working conditions. . . ." 5 U.S.C. § 7103(a)(14) (1980). This definition alone does not exclude compensation and fringe benefits.

The Army, however, argues that a comparison between the FSLMRA and the National Labor Relations Act (NLRA) reveals that "conditions of employment" do not include wage and fringe benefits. The NLRA allows bargaining over "wages, hours and *other* terms and conditions of employment." 29 U.S.C. § 158(d) (Supp. 1988) (emphasis added). The Army urges that "conditions of employment" in the FSLMRA encompasses a narrower range of bargainable matters than the NLRA terminology because the FSLMRA did not specifically list wages and hours as bargainable matters. In contrast to the Army's position, the absence of the terms "wages" and "hours" from the FSLMRA does not prove that Congress intended to exclude them from negotiations. Rather, the NLRA's description of bargainable matters supports the FLRA's position. By using the word "other," Congress included wages and hours in the general category of "conditions of employment." Congress likely specified "wages" and "hours" in the NLRA merely to illustrate the meaning of the new term "conditions of employment." In the FSLMRA, Congress simply used the general term "conditions of employment," which encompasses wages, to define the scope of negotiable matters.

The Army further argues that another section of the FSLMRA demonstrates that Congress did not intend conditions of employment to include wages. The Civil Service Reform Act of 1978, which includes the FSLMRA, specifically provides that the FSLMRA does not apply to prevailing rate employees who had negotiated over pay prior to August 19, 1972, to the extent that any of the FSLMRA's provisions conflict with their negotiation practices. The Army contends that this section serves no purpose if the FSLMRA authorizes employees, whose wages Congress did not set, to bargain for wages. The legislative

history demonstrates that this section serves a purpose even if the FSLMRA allows bargaining over wages. Congressman Ford stated this section's purpose: "This provision is required because of two recent rulings by the Comptroller General which . . . held that specific legislative authorization was necessary for these employees to continue to negotiate such provisions in accordance with prevailing private industry practice." 124 Cong. Rec. H8468 daily ed. Aug. 11, 1978) (remarks of Rep. Ford). Thus, this provision clarifies and extends the exemption from the prevailing rate act for such employees. *American Federal of Government Employees*, 24 F.L.R.A. at 380.

Turning from the FSLMRA's language to its legislative history, the Army argues, citing the Third Circuit, that Congress did not intend to allow bargaining over compensation. The Third Circuit recently held that Congress did not intend the FSLMRA to allow bargaining over the Navy's pay practices for the Military Sealift Command's (MSC) civilian mariners. *Dep't. of the Navy, Military Sealift Command v. FLRA*, 836 F.2d 1409 (3d Cir.1988). The court found that section 5348 of the prevailing rate system specifically gives the Navy limited discretion over the MSC's pay practices. *Dep't. of the Navy*, 836 F.2d at 1410. Because bargaining over such pay practices is outside the Navy's discretion, such negotiation would conflict with law, excluding the matters from the duty to bargain. The court examined the FSLMRA's legislative history to determine if Congress intended the FSLMRA to supersede section 5348 and subject the MSC's pay practices to collective bargaining. *Dep't. of the Navy*, 836 F.2d at 1417. The court concluded that Congress did not intend the FSLMRA to allow federal employees to negotiate over compensation. *Dep't. of the Navy*, 836 F.2d at 1419.

In contrast, the Second Circuit implicitly adopted the FLRA's conclusion that the FSLMRA does not bar

negotiation of proposals involving compensation and fringe benefits. *See West Point Elementary School Teachers Assoc.*, at 942. The court concluded that "conditions of employment" in the FSLMRA included wage and fringe benefit proposals when the federal government did not specifically provide for such matters. *West Point Elementary School Teachers Assoc.*, at 942.

Despite the Third Circuit's holding that Congress did not intend the FSLMRA to allow federal employees to bargain over wages, we agree with the FLRA and the Second Circuit that Congress did not intend to preclude all bargaining over compensation. The legislative history indicates that Congress intended to treat wages and fringe benefits as other conditions of employment; the parties must bargain over them unless a federal statute specifically provides for them or the proposed matters would conflict with law. *See* 5 U.S.C. §§ 7103(a)(14)(C) and 7117(a)(1)(1980). Because federal law dictates nearly all federal employees' wages, the legislative history contains many general statements claiming that the FSLMRA does not make wages negotiable. *See* 5 U.S.C. § 5341-5349 (1980 & Supp.1988).

A close examination of the congressional reports and debates reveals that the FSLMRA's supporters made these statements with the understanding that Congress generally regulates such matters through its prevailing rate acts, not with the understanding that the FSLMRA barred all wage negotiations. The House Report on the Committee's bill provides: "Federal pay will continue to be set in accordance with the pay provisions of title 5, and fringe benefits, including retirement, insurance, and leave, will continue to be set by Congress." H.R.Rep. No. 95-1403, 95th Cong., 2d Sess. 12 (1978). Congressman Udall, the sponsor of the amended version which Congress ultimately

enacted into law stated, "[t]here is not really any argument in this bill or in this title about federal collective bargaining for wages and fringe benefits and retirement. . . . All these major regulations about wages and hours and retirement and benefits will continue to be established by law through congressional action." 124 Cong.Rec. H9633 (daily ed. Sept. 13, 1978) (remarks of Rep. Udall); *reprinted in* Subcomm. on Postal Personnel and Modernization of the House Comm. on Post Office and Civil Service, 96th Cong., 1st Sess., Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978, at 923 (1979) [hereinafter *Legislative History*]. Moreover, Congressman Ford who strenuously advocated the bill's adoption stated: "[N]o matters *that are governed by statute (such as pay, money-related fringe benefits,* retirement and so forth) could be altered by a negotiated agreement." 124 Cong.Rec. H8468 (daily ed. Aug. 11, 1978) (remarks of Rep. Ford); *Legislative History* at 855-56 (emphasis added). Finally, Congressman Clay, supporting Congressman Udall's substitute legislation, stated:

> Section 7103(a)(14)(D), removing from subjects of bargaining those matters specifically provided for by Federal statute, was adopted by the committee and retained in the Udall substitute with the clear understanding that only matters "specifically" provided for by statute would be excluded under this subsection. Thus, where a statute merely vests authority over a particular subject with an agency official with the official given discretion in exercising that authority, the particular subject is not excluded by this subsection from the duty to bargain over conditions of employment.

124 Cong.Rec. H9638 (daily ed. Sept. 13, 1978) (remarks of Rep. Clay); *Legislative History* at 933. Thus, although

some legislators' remarks baldly assert that wages are not negotiable, the above comments indicate that the legislators merely were assuring their peers that the FSLMRA would not supplant specific laws which set wages and benefits.

The legislative history additionally demonstrates that Congress intended the FSLMRA to continue the existing practices regarding the negotiation of wages. Congressman Clay stated that "employees *still* . . . cannot bargain over pay." 124 Cong. Rec. E4293 (daily ed. Aug. 3, 1978) (remarks of Rep. Clay); *Legislative History* at 839 (emphasis added). Similarly, Congressman Devinski stated that wages and fringe benefits remained beyond the scope of collective bargaining. 124 Cong.Rec. H9639 (daily ed. Sept. 13, 1978) (remarks of Rep. Devinski); *Legislative History* at 935.

One such existing practice allowed federal employees to negotiate wages in the rare instances where Congress did not specifically establish wages and fringe benefits. *American Fed'n of Gov't Employees,* 24 F.L.R.A. at 381; *see United Fed'n of College Teachers, Local 1460 and U.S. Merchant Marine Academy,* 1 FLRC 211 (1972) (Federal Labor Relations Council (FLRC) held that the academy's teachers could bargain for their wages because their proposals did not violate the laws giving the Secretary of Commerce discretion to set their salaries); *Overseas Educ. Assoc., Inc. and Dept. of Defense, Office of Dependents Schools,* 6 FLRC 231 (1978) (the duty to bargain encompassed proposals involving procedures and formulas for setting teacher compensation because the federal act governing these teachers' pay did not bar negotiation on the proposals). Congress should have known of this practice because the FSLMRA specifically mandates that decisions under Executive Order 11941 continue in effect

unless superceded [*sic*]; the FLRC administered the above decisions under this executive order. 5 U.S.C. § 7135(b) (1980). Consequently, we agree with the FLRA that Congress did not intend to preclude bargaining over wages and related benefits.

2. Relationship of the Union's Proposals to Federal Law

As mentioned above, the FSLMRA excludes from conditions of employment any matters provided for by federal statute or inconsistent with federal law. 5 U.S.C. §§ 7103(a)(14)(C) & 7117(a)(2) (1980). Although the federal prevailing rate act sets wages for most federal employees, the statute creating the Fort Stewart schools specifically excludes the schools' employees from these federal laws. *See* 20 U.S.C. § 241. The Army contends, however, that federal law still provides for these employees' wages and benefits. The Army argues that section 241 specifically sets compensation and leave practices for these employees because this section requires it to compensate the dependents schools' employees according to local public school practices. The FLRA concluded that section 241 does not require the Army to equalize the dependents school employees' and local school employees' compensation. We need not defer to the FLRA's conclusion, however, because such deference only applies when the FLRA interprets the FSLMRA. *See West Point Elementary School Teachers Assoc.,* at 940; *Dep't. of Treasury v. FLRA,* 837 F.2d 1163, 1167 (D.C.Cir.1988) (courts need not defer to FLRA decision interpreting a statute other than the FSLMRA).

Section 241 requires that the Army "to the maximum extent practicable" provide a comparable education to local public schools at a cost per pupil not exceeding the per pupil cost of free public education in local communities.

20 U.S.C. § 241(a) & (e) (1974 & Supp.1988). The Second Circuit recently held that these provisions did not specifically set the dependents schools' teachers' salaries because the Army could maintain cost parity and educational comparability despite wide variations in teachers' salaries; consequently, the Second Circuit concluded that the Army had a duty to bargain over a salary proposal. *West Point Elementary School Teachers Assoc.*, at 943.

We agree with the Second Circuit that section 241 does not specifically provide for the schools' teachers' and other employees' wages. First, section 241 as a whole demonstrates that the Army has wide discretion to set these employees' salaries. The third sentence of section 241(a) requires dependents schools outside the continental United States, Alaska, and Hawaii to provide a "comparable education" to free public schools in the District of Columbia. 20 U.S.C. § 241(a) (Supp.1988). In 1978, Congress added another sentence to section 241(a) which reads: "Personnel provided for under this subsection outside of the continental United States, Alaska, and Hawaii, shall receive such compensation, tenure, leave, hours of work, and other incidents of employment on the same basis as provided for similar positions in the public schools in the District of Columbia." 20 U.S.C. § 241(a) (Supp.1988). Interpreting "comparable education" to include comparable salaries would make the additional sentence redundant.

The Army argues that this sentence is not redundant if "comparable education" includes comparable wages, but rather, the sentence is unnecessary if comparable education did not incorporate comparable salaries. According to the Army, Congress amended section 241 because it wanted to raise the Puerto Rican dependents school employees' salaries above the local schools' insufficent

wages. The Army argues that Congress could have raised their salaries without amending section 241 if this section did not require the Army to pay its school employees a comparable salary to local public school employees.

Contrary to the Army's contention, if comparable education included comparable salaries, Congress would not have needed to amend section 241 to raise the Puerto Rican schools' employees' pay. Section 241 already required the Army to provide the schools outside the United States with a comparable education to the District of Columbia's public schools; therefore, Congress did not need to add the new sentence if Congress only intended to raise the schools' salaries. Rather, Congress added this sentence to correct the existing pay practices which "invite[d] abuse but not specifying personnel practices, especially regarding salary. . . ." H.R.Rep. No. 1137, 95th Cong., 2d Sess. 108, *reprinted in* 1978 U.S.Code Cong. & Admin.News 4971, 5078. Consequently, if comparable education included comparable salaries, Congress would not have needed to pass this amendment. We decline to construe the statute to render this provision mere surplusage. *See United States v. Wang Kim Bo*, 472 F.2d 720, 722 (5th Cir.1972) (courts should not construe statutes to make words meaningless or surplusage where Congress expressly included the words).

Second, the legislative history demonstrates that Congress did not intend comparable education to require identical salaries. In 1959, the Comptroller General issued a decision holding that under section 241 as it existed at that time, the Army could not compensate West Point teachers according to teachers' salaries in a neighboring city. In response to the Army's legislative proposals to change this ruling, Congress amended section 241 in 1965 to provide: "For the purpose of providing such comparable education,

personnel may be employed and the compensation, tenure, leave, hours of work and other incidents of the employment relationship *may* be fixed without regard to the Civil Service Act and rules. . . ." 20 U.S.C. § 241(a) (1974 & Supp. 1988) (emphasis added). By choosing the term "may," Congress did not require the military departments to establish compensation in accordance with local public schools, but merely gave military departments the discretion to deviate from the prevailing rate act and establish compensation in such manner.

A senate report similarly demonstrates that section 241 does not require comparable salaries. The senate report accompanying the 1965 amendment illustrates that Congress amended section 241 in response to the Army's request to compensate teachers comparable to the teaching profession rather than to local school practices. S.Rep. No. 311, 89th Cong., 1st Sess., *reprinted in* 1965 U.S. Code Cong. & Admin. News 1910, 1913. The Army explained that the federal pay acts did not practically accommodate the teaching profession: teachers' salary schedules are set on a school-year basis while the federal pay acts set salaries on a calendar year; federal employees receive overtime pay but teachers receive fixed amounts for extracurricular activities; and teachers do not observe the forty-hour work week of most federal employees. *See* 1965 U.S.Code Cong. & Admin.News at 1913. Because of these differences, the Army concluded: "Based upon the Department's experience in operating [dependents] schools, it is highly desirable that the personnel practices for instructional personnel be patterend after those usually encountered in the teacher profession rather than those which have been developed for the Federal Service as a whole." 1965 U.S.Code & Admin. News at 1913. Thus, Congress amended section 241 to allow the Army to compensate its teachers in accordance with the entire teaching

profession rather than mandating it to adhere to the local public schools' pay practices.

We conclude that section 241 does not compel the Army to follow local public schools' pay practices, therefore, the Army has discretion for setting the dependents schools' employees' salaries. Because the Army has such discretion, the Union's proposals do not conflict with or involve matters specifically set by law. Consequently, we hold that the Union's compensation and fringe benefits proposals involve conditions of employment subject to the duty to bargain.

B. *Compelling Need*

As stated above, no duty to bargain exists over proposals that conflict with an agency regulation for which a compelling need exists. 5 U.S.C. § 7117(a)(2) (1980). The Army contends that the Union's proposals conflict with Army Regulation 352-3, 1-7 and that a compelling need exists for this regulation. This regulation requires the dependents schools' salary schedules to equal those of the local schools "to the maximum extent practicable."[6]

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[6] This regulation provides:

1-7. Comparison factors. Education provided pursuant to the provisions of Section 6 for children residing on Federal property will be considered comparable to free public education offered by selected communities of the State when the following factors are, to the maximum extent practicable, equal:

a. Qualifications of professional and nonprofessional personnel.

b. Pupil-teacher ratios.

c. Curriculum for grades offered, including kindergarten and summer school, if applicable.

d. Accreditation by State or other accrediting association.

e. Transportation services (student and support).

f. Length of regular and/or summer term(s).

Because some of the Union's proposals conflict with this regulation, we must decide whether a compelling need exists for this regulation.[7]

The FLRA and the Second Circuit have concluded that no compelling need exists for this regulation. A compelling need exists if the "rule or regulation is essential, as distinguished from helpful or desirable, to the accomplishment . . . of functions of the [Army]. . . . [or] the rule or regulation implements a mandate to the [Army] . . . under law . . . which implementation is essentially nondiscretionary in nature." 5 C.F.R. § 2424.11(a) & (c) (1986). We agree with the FLRA and the Second Circuit that Army Regulation 352-3, 1-7 does not "implement a mandate to the Army" because as discussed above, section 241 does not require the Army to compensate its school employees according to local public school practices. *Accord West Point Elementary School Teachers Assoc.*, at 943. Similarly, this regulation is not "essential" to the Army providing a comparable education at a comparable cost per pupil. As the Second Circuit recently concluded, the Army can achieve both of these goals notwithstanding large variations in the employees' wages because many expenses beyond their salaries enter into the per pupil expenditures.

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g. Types and numbers of professional and nonprofessional positions.

h. Salary schedules.

i. Conditions of employment.

j. Instructional equipment and supplies. Army Regulation AR 352-3, 1-7.

[7] After deciding that no compelling need exists for the Army's regulation, the FLRA concluded that the Army did not show that Sections A through G, I and J of Proposal 1 conflicted with the regulation. Because we find that no compelling need exists for this regulation, we need not address whether these sections conflict with the Army regulation.

West Point Elementary School Teachers Assoc., at 943. For example, books, building maintenance, athletic programs, clubs, and lunch services also enter into this calculation. Many factors other than teachers' compensation also affect the quality of education. Moreover, section 241 requires equality only to the maximum extent possible, not exact equality. Consequently, the Army has not established a compelling need for this regulation.

C. *Army's Right to Set its Budget*

The Army finally contends that the Union's proposals infringe upon its right to set its budget. The FLRA concluded that the Army failed to demonstrate that the Union's proposals interfere with its right to determine its budget. We must give deference to the FLRA's decision because this decision involves the application of the FSLMRA. *See* 5 U.S.C. § 7106(a)(1) (Army has a right to set its budget); *see also Bureau of Alcohol, Tobacco and Firearms v. FLRA*, 464 U.S. 89, 97, 104 S.Ct. 439, 444, 78 L.Ed.2d 195 (1983) (FLRA is entitled to considerable deference when it applies the FSLMRA to federal labor relations disputes). Further, we accept the FLRA's findings of fact because the record as a whole provides substantial evidence to support such findings. *See* 5 U.S.C. § 7123(c) (1980).

In *West Point*, the Second Circuit rejected the Army's contention that a salary proposal interfered with its right to set its budget. The court noted that the proposal did not specify particular salary figures and that the proposal would not necessarily increase the Army's costs. *West Point Elementary School Teachers Assoc.*, at 944. Consequently, the court deferred to the FLRA's decision that the proposal violated such right.

We similarly defer to the FLRA's decision that the Union's proposals do not invade the Army's right to make its budget. A proposal does not infringe on an agency's right to determine its budget merely because the proposed matter will increase the agency's costs. *AFGE and Air Force Logistics Command,* 2 F.L.R.A. at 607. Rather, an agency must show either that the proposals "(1) prescribe the particular programs or operations the agency would include in its budget or . . . prescribe the amount to be allocated in the budget," or (2) would cause significant and unavoidable cost increases without creating any compensating benefits. *AFGE and Air Force Logistics Command,* 2 F.L.R.A. 604. The FLRA concluded that the Army did not demonstrate that the proposals would cause substantial and unavoidable cost increases.

The evidence supports this conclusion. The proposals would not necessarily increase the Army's costs; the Army did not specify any amount by which the proposed matters would increase its budget. Further, any increase in the employees' salaries would not significantly increase the Army's budget; the Army concedes that its budget includes bases, troops, weapons, vehicles, other equipment, salaries for all other officers, and expenses for its eight other schools. Finally, the Army did not establish that no compensating benefits would offset such costs even if its costs increased. Therefore, we defer to the FLRA's decision because the record supports the FLRA's conclusions and hold that the Army failed to establish that the Union's proposals would interfere with its right to determine its budget.

CONCLUSION

For the above reasons, we hold that the Union's proposals concerning compensation and fringe benefits involve conditions of employment within the agency's discretion, creating a statutory duty to bargain. Furthermore, we conclude that the FLRA properly found that the Army did not establish a compelling need for its regulations. Finally, we hold that the FLRA properly held that the Union's proposals did not interfere with the Army's right to determine its own budget. Consequently, we grant the FLRA's and the Union's petition to enforce the FLRA's order, and we deny the Army's petition for review.

AFFIRMED.

APPENDIX A

Proposal 1

Article 25: Salary and Benefits

A. The salary schedule shall be subject to annual review beginning approximately the 15th of December of each year. The Association shall be consulted in the review. Employer will maintain salaries on a competitive level with comparable school districts. The comparable school districts which shall be used for salary and fringe benefits comparison purposes shall be Liberty and Chatham Counties and Atlanta City Schools.

B. The ceiling for years of experience shall be extended from 16 to 20 years.

C. Pay lanes on the salary schedule shall be established for each category of teachers at Fort Stewart Schools justified by the results of a wage survey system conducted by the Employer.

D. A copy of all data collected shall be provided to the Association for independent analysis. The Employer shall consult the Association to explain its analysis and attempt to resolve any differences of opinion before the salary schedule is developed.

E. All increases on the salary schedule shall be applied across the board.

F. The salary schedule shall reflect the cost of living increase no later than thirty (30) days after it is released by the Federal government.

G. Completion of Higher Level Education

1. A teacher who completes the advanced education required to qualify for a salary under a higher education salary schedule shall be assigned the higher salary rate retroactive to the 1st day of the school year preceding the date the education was completed. Such adjustment shall be made upon receipt of written documentation in which the college or university concerned specifies the date when the teacher completed the advanced education, or the date when the teacher met the requirements for a specific degree.

H. Maintain procedure for development of salary schedule for all unit members who are on the civil service pay scales.

I. Summer school salaries shall be based on the unit member's regular hourly rate of pay.

J. Any unit member whose employment is terminated by the Employer will be given a lump sum payment for unused sick leave.

K. Mileage Reimbursement

The use of personally owned vehicles for authorized school business shall be reimbursed at the rate of 40 cents per mile.

L. Health Insurance

The Employer shall pay the full amount of health insurance premium for each unit member who elects to participate in the health insurance program. The Employer will pay the premium for the family coverage portion in the health benefit program if the unit member desires this additional coverage.

M. Life Insurance Benefit

The Employer shall pay the full amount of life insurance premium for each unit member. The coverage shall be the basic life insurance plan. Unit members shall have the option to pay the premiums for any additional insurance options elected.

N. Unit members will continue to receive all health benefits currently held which have not been specifically enumerated in previous articles of this Agreement.

O. Any subsequent benefits provided to the Federal service in health benefits, insurance benefits, disability and retirement, sick leave, and workers compensation shall automatically accrue to the unit members.

APPENDIX B

Proposal 3

Article 11: Leave

Section 1. Sick and annual leave for Unit Members whose services are required for twelve (12) months will accrue and be granted in accordance with the An-

nual and Sick Leave Act of 1951, as amended 5 USC Chapter 63 and applicable Civilian Personnel Regulations.

Section 2. Sick leave, annual leave, administrative, and other types of leave for those Unit Members whose services are not required for twelve (12) months will be administered as follows:

A. *Sick Leave.* Unit members shall accumulate sick leave at a rate of four (4) hours per pay period not to exceed thirteen (13) days shall be accredited to Unit Members at the beginning of the school year. Sick leave will accumulate without limit and can be taken for any time during the school year, but payment for sick leave taken in excess of that earned will be recovered. No accrued sick leave shall be carried over to any succeeding period when there is a break in federal employment in excess of three (3) continuous years.

1. Sick leave will be granted for the following purposes:

(a) medical, dental or optical examination or treatment;

(b) sickness or injury;

(c) medical disability connected with pregnancy;

(d) exposure to a contagious disease;

(e) illness of a member of the immediate family or near relative who resides in the same household or for whom the employee is financially responsible;

(f) death of an immediate family member or near relative.

2. As used in this section, immediate family shall mean spouse, grandparent, parent-in-law, child, grandchild, or sibling. Near relative shall include immediate family and extend to first cousin, aunt, uncle, niece, nephew, brother-in-law, daughter-in-law, or son-in-law.

3. In the cases requiring a substitute teacher, absence chargeable to sick leave will be for not less than four (4) hours. When no substitute is employed, sick leave will be taken in multiples of one hour. The decision as to whether a substitute is required shall be made solely by management officials.

4. Unit members must obtain approval from the principal before sick leave that has not been accrued can be used.

5. Unit members may be required to provide a doctor's statement in the case of a period of absence which exceeds five (5) consecutive days.

6. Upon retirement, credit for unused sick leave shall be administered in accordance with FPM Supplement 831-1 Subchapter S3-7.

7. The Employer and Association shall meet by November fifteen (15) to discuss the establishment of a sick leave bank.

B. *Personal Leave*

1. During any school year, a unit member may utilize up to a maximum of three days of accumulated sick leave for personal reasons. Notification of the use of such leave will be made one (1) day in advance. Two (2) days of personal leave may be carried over to the next year for a maximum of five (5) personal days.

2. No personal leave will be taken on the day before or immediately after spring vacation, testing days, nor on inservice days or conference days unless such leave has been approved by the Superintendent.

3. Personal leave will be for not less than four (4) hours in those cases where a substitute teacher is employed. When no substitute is employed, personal leave will be taken in multiples of one hour. The decision as to whether a substitute is required shall be made solely by management officials.

C. *Professional Leave of Absence.* Professional leave of absence may be granted by the Employer subject to the following:

1. After five (5) years of continuous service at Fort Stewart, sabbatical leave of absence without pay may be granted for up to one (1) employee per school year at the discretion of the Employer. Such leave shall be granted for the purpose of advanced study, research, professional writing, or other experience of recognized value in an employee's restrictive field.

2. Applications will be submitted to the Superintendent of Schools not later than 1 April

of the school year prior to the year the leave is to be taken. Applications will include:

(a) reason for leave;

(b) proposed length of time;

(c) where leave will be spent;

(d) outline of studies or activities to be taken.

3. Professional leave of absence will normally be granted for one (1) school year. Leave may be granted for a semester.

4. While in a leave status, employees will not be eligible to accrue sick leave but will be entitled upon return to duty to any sick leave accrued prior to the professional leave. Upon return to duty, the employee will be entitled to advance one (1) step on the salary schedule, if the studies or activities as proposed when the leave was granted have been completed.

5. Unit members will not accrue seniority but will be entitled upon return to duty any seniority accrued prior to the professional leave.

6. While in a leave status employees may continue their participation in the health and life insurance programs by payment of required premiums.

7. Unit members may utilize up to a maximum of five (5) days with pay per school year for education related purposes, such as school visitations, conferences, and workshops. Approval for the above leave shall be granted by the Superintendent.

D. *Court Leave.* Employees serving on jury duty or subpoenaed to court shall be carried on court

leave without financial loss or loss of sick or annual leave.

1. An employee on court leave may not receive fees for jury service on regular workdays in a Federal court. The employees may receive and retain fees for such duty performed on non-workdays or on holidays on which the employee would otherwise have been excused from work.

2. An employee on court leave will accept fees received from state or municipal courts and turn them in to the Civilian Pay Section of Fort Stewart Finance and Accounting Office. The employee may retain pay received for travel and subsistence expenses. Fees received for jury duty service performed outside normal duty hours or on holidays on which the employee would otherwise have been excused may be retained.

E. *Maternity/Paternity/Adoption Leave.* Maternity, paternity, and adoption leave will be administered as follows:

1. For female employees having a child, accumulated sick leave may be used one and one half (1½) months prior to having the child upon presentation of a certificate of incapacity. Once the child is delivered the employee may use sick leave up to a period of one and one half (1½) months after the child is delivered. Once the one and one half (1½) months of sick leave have been exhausted and the employee still desires further time away from work, the employee will be granted leave without pay. In no case will leave without pay be granted for more than one (1) year.

2. For male employees who desire to stay at home with their child, leave without pay may be granted for a period not to exceed one (1) year. A male employee may also make use of personal leave (see Section 1, paragraph b of this Article) for paternity leave.

3. For any employee who desires to stay at home with an adopted child, leave without pay may be granted for a period not to exceed one (1) year. Leave without pay may be taken prior to finalization of the adoption if such leave is necessary to take part in court proceeding or other action relating to the adoption. Personal Leave (Section 1, paragraph b of this Article) may also be utilized.

4. An employee shall make known intent to request leave including the type of leave, approximate dates, and anticipated duration to allow the Employer to prepare for any staffing adjustments which may be necessary.

F. *Leave Without Pay (LWOP).*

1. LWOP is requested by an employee and may be approved at the discretion of the immediate supervisor.

2. Leave without pay may be granted to unit members for the following reasons:

(a) educational leave or travel;

(b) such other reasons as are approved by the Superintendent

3. The minimum charge of LWOP is one (1) hour and additional charges in multiples of one (1) hour.

4. Maximum amount of LWOP that may be taken during one (1) school year is one (1) month except as provided in Section 1, paragraph 3 (Maternity/Paternity/Adoption Leave).

APPENDIX B

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

Case No. 0-NG-1071

FORT STEWART (GEORGIA) ASSOCIATION OF EDUCATORS
UNION

AND

FORT STEWART SCHOOLS
AGENCY

DECISION AND ORDER ON NEGOTIABILITY ISSUES[1]

I. Statement of the Case

This case is before the Authority because of a negotiability appeal filed under section 7105(a)(2)(D) and (E) of the Federal Service Labor-Management Relations Statute (the Statute) and concerns the negotiability of three proposals.

II. Proposals 1 and 2

Proposal 1

Article 25: Salary and Benefits

A. The salary schedule shall be subject to annual review beginning approximately the 15th of December of each year. The Association shall be

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[1] Chairman Calhoun filed a separate opinion agreeing in part and dissenting in part from the decision in this case.

consulted in the review. Employer will maintain salaries on a competitive level with comparable school districts. The comparable school districts which shall be used for salary and fringe benefits comparison purposes shall be Liberty and Chatham Counties and Atlanta City Schools.

B. The ceiling for years of experience shall be extended from 16 to 20 years.

C. Pay lanes on the salary schedule shall be established for each category of teachers at Fort Stewart Schools justified by the results of a wage survey system conducted by the Employer.

D. A copy of all data collected shall be provided to the Association for independent analysis. The Employer shall consult the Association to explain its analysis and attempt to resolve any differences of opinion before the salary schedule is developed.

E. All increases on the salary schedule shall be applied across the board.

F. The salary schedule shall reflect the cost of living increase no later than thirty (30) days after it is released by the Federal government.

G . Completion of Higher Level Education

1. A teacher who completes the advanced education required to qualify for a salary under a higher education salary schedule shall be assigned the higher salary rate retroactive to the 1st day of the school year preceding the date the education was completed. Such adjustment shall be made upon receipt of written documentation in which the college or university concerned specifies

the date when the teacher completed the advanced education, or the date when the teacher met the requirements for a specific degree.

H. Maintain procedure for development of salary schedule for all unit members who are on the civil service pay scales.

I. Summer school salaries shall be based on the unit member's regular hourly rate of pay.

J. Any unit member whose employment is terminated by the Employer will be given a lump sum payment for unused sick leave.

K. Mileage Reimbursement

The use of personally owned vehicles for authorized school business shall be reimbursed at the rate of 40¢ per mile.

L. Health Insurance

The Employer shall pay the full amount of health insurance premium for each unit member who elects to participate in the health insurance program. The Employer will pay the premium for the family coverage portion in the health benefit program if the unit member desires this additional coverage.

M. Life Insurance Benefit

The Employer shall pay the full amount of life insurance premium for each unit member. The coverage shall be the basic life insurance plan. Unit members shall have the option to pay the premiums for any additional insurance options elected.

N. Unit members will continue to receive all health benefits currently held which have not been spe-

cifically enumerated in previous articles of this Agreement.

O. Any subsequent benefits provided to the Federal service in health benefits, insurance benefits, disability and retirement, sick leave, and workers compensation shall automatically accrue to the unit members.

Proposal 2

The Association and the Employer agree that the salary increase for all bargaining unit members will be 13.5% for the school year.

A. Positions of the Parties

The Agency views Proposal 1 and Proposal 2 as mutually exclusive. Specifically, the Agency claims that Proposal 1 was withdrawn and replaced with Proposal 2. Thus, the Agency contends that Proposal 1 is not properly before the Authority. Substantively, the Agency alleges generally that the proposals do not concern "conditions of employment," as defined in section 7103(a)(14) of the Statute and therefore are outside the duty to bargain under section 7117. The proposals, in the Agency's view, also interfere with its right to determine its budget under section 7106(a)(1). The Agency also asserts that the proposals violate Federal statutes, Agency regulations having the force and effect of law, and an Agency regulation for which a compelling need exists. In addition, the Agency alleges that sections L, M, N and O of Proposal 1 are non-negotiable because they concern matters specifically provided for by Federal law.

The Union explains that Proposal 1 concerns the pay-fixing process for the life of the negotiated agreement and that Proposal 2 provides for a specific salary increase for

a particular school year. See Memorandum, dated November 8, 1984, enclosed with the Petition for review. As to the substance the Union asserts that the proposals are negotiable based on *Fort Bragg Unit of North Carolina Association of Educators, National Education Association and Fort Bragg Dependents Schools, Fort Bragg, North Carolina,* 12 FLRA 519 (1983).

B. Analysis and Conclusion

1. Proposal 1 is properly before the Authority

There is nothing in the record to support the Agency's claim that Proposal 2 was submitted as a replacement for Proposal 1. In addition, based on the Union's statement of intent, Proposals 1 and 2 concern different aspects of the pay-setting process and thus are not mutually exclusive.

2. Conditions of Employment

The Agency's position, based primarily on the legislative history of the Statute, is that Congress did not intend to include teachers' pay among negotiable conditions of employment. This Agency argument was considered and rejected by the Authority in *Fort Bragg Dependents School* and subsequent cases. Briefly stated, we have consistently held that nothing in the Statute or its legislative history prevents bargaining over employee compensation insofar as: (1) the matters proposed are not specifically provided for by law and are within the discretion of the agency; and (2) the proposals involved are not otherwise inconsistent with law, applicable Government-wide rule or regulation, or with an agency regulation supported by a compelling need. *See also American Federation of Government Employees, AFL-CIO, Local 1897 and Department of the Air Force, Eglin Air Force Base, Florida,* 24 FLRA No. 41 (1986).

Here, the employees covered by the proposals are employed under the provisions of 20 U.S.C. § 241. We have previously held that nothing in 20 U.S.C. § 241 or in its legislative history, relied upon by the Agency, indicates that Congress intended to restrict an agency's discretion concerning the particular employment practices relating to compensation which could be adopted. *Fort Knox Teachers Association and Fort Knox Dependent Schools*, 26 FLRA No. 108 (1987), *petition for review filed sub nom. Fort Knox Dependent Schools v. FLRA*, No. 87-3593 (6th Cir. Jun. 25, 1987). Thus, the Agency has not established that either of the proposals concerns a matter specifically provided for by law, or that they are outside the Agency's discretion to adopt.

Moreover, even assuming the correctness of the Agency's position respecting negotiation of pay matters, the Agency has cited no specific grounds for finding sections A, C and D of Proposal 1 nonnegotiable. These sections do not concern the amounts of compensation to be paid unit employees. Rather, they merely authorize the Union to review and comment on data used to determine employee salary schedules. Consequently, even if compensation were found to be a nonnegotiable matter, sections A, C and D would still be within the Agency's duty to bargain.

3. *Agency's Right to Determine its Budget*

To establish that a proposal directly interferes with an agency's right to determine its budget under section 7106(a)(1) of the Statute, an agency must make a substantial showing that the proposal requires the inclusion of a particular program or amount in its budget or that the proposal will result in significant and unavoidable increases in cost not affected by compensating benefits.

American Federation of Government Employees, AFL-CIO and Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, 2 FLRA 604 (1980), *enforced as to other matters sub nom. Department of the Air Force v. Federal Labor Relations Authority* 695 F.2d 1140 (D.C. Cir. 1981), *cert. denied sub nom. AFGE v. FLRA*, 455 U.S. 945 (1982).

The Agency here contends that finding these proposals negotiable would result in a significant increase in costs for the entire dependents school system. It points out that the system is comprised of seven additional bargaining units with 626 members whose salaries total $11.3 million. It reasons that, if the proposals are found to be negotiable, the other units would seek to negotiate on similar proposals. Statement of Position at 9.

In our view, the Agency's reasoning does not satisfy the requirement of a substantial showing that the proposal would result in substantial and unavoidable cost increases not offset by compensating benefits. While the Agency provides us with the information set forth immediately above, it does not indicate how many employees would actually be affected by the proposals or the monetary increase which would be directly attributable to implementation of the proposals in other bargaining units within the system. In fact, the Agency does not advise us of the amount of the increase resulting from the proposals within the bargaining unit itself. Thus, the Agency has failed to establish that increased costs could be expected or even that increased costs would be unavoidable. *See Fort Knox Teachers Association and Fort Knox Dependents Schools*, 28 FLRA No. 29 (1987).

The Agency also has failed to show that any increased costs, which it asserts are unavoidable, would not be offset by compensating benefits. Instead, it contends that Con-

gress' action in exempting teachers from statutes governing pay and certain benefits for Government employees constitutes a finding that increases in teachers' pay are not offset by compensation benefits. Statement of Position at 8-9. We find this argument unpersuasive. Even assuming that the congressional action had the implications suggested by the Agency, the legislative action was based on the cost differential between existing pay and personnel practices under title 5 U.S. Code and those subsequently embodied in 20 U.S.C. § 241. The congressional action therefore cannot be construed to cover the alleged cost increases which would result from implementing these proposals within this bargaining unit. *See Fort Knox Dependents Schools*, 28 FLRA No. 29 (1987). Furthermore, as we noted in section B.2., above, nothing in 20 U.S.C. § 241, or in its legislative history as relied upon by the Agency, indicates that Congress sought to restrict the Agency's choice in adopting a particular employment practice relating to pay and fringe benefits not otherwise provided for by law. Moreover, as to the requirement that per pupil expenditures in dependents schools be limited to the amounts expended by comparable communities in the same state, the Authority held in *Fort Bragg Dependents Schools,* 12 FLRA 519 that employee compensation is but one of the factors to be considered in determining whether the limitation has been exceeded.

Finally, the Authority also noted in *Fort Bragg Dependents Schools* 12 FLRA 519, 523, that while the consequences of a proposal necessarily are considered in the collective bargaining process, "should matters of concern to the Agency, such as cost, prevent the parties from reaching agreement, that consideration could be presented to the Federal Service Impasses Panel in a proceeding to resolve a negotiation impasse pursuant to section 7119 of the Statute."

4. *Procurement Law and Regulations*

The Agency asserts that the proposals violate law, specifically 10 U.S.C. § 2304 concerning the solicitation of contract bids in the procurement process. The Agency also contends that the proposals violate Government procurement regulations having the force and effect of law, which govern the negotiation and administration of procurement contracts, namely the Federal Acquisition Regulation. In effect, the Agency argues that the "personal services contracts" under which bargaining unit employees are hired must be awarded in conformity with procurement law and related Federal regulations, and that bargaining over pay and related fringe benefits is inconsistent with those statutory and regulatory requirements.

We find that claim to be without merit. Essentially the same claim was raised by the Agency and rejected in *Fort Knox Teachers Association and Board of Education of the Fort Knox Dependents Schools,* 27 FLRA No. 34 (1987). In that case, we noted the well-established principle that teachers employed under 20 U.S.C. § 241 are not independent contractors but, rather, are employees of the Federal Government, subject to all statutes governing Government employment unless expressly exempted. Consequently, we determined that the Agency had failed to demonstrate that procurement law and regulations applied in any manner to, or governed the employment relationship of, teachers employed in the dependents school system. Similarly, the Agency in this case has failed to show that procurement law and regulations govern bargaining unit working conditions.

5. *The "Antideficiency Act"*

The Agency contends that, because the proposals would obligate it to expend certain funds for salaries and other

benefits in a succeeding fiscal year, they violate provisions of the "Antideficiency Act" (the Act), 31 U.S.C. § 1341.

In *Fort Knox Dependents Schools*, 27 FLRA No. 34, we examined a similar argument in response to a proposal concerning both paid and unpaid leave. In rejecting the Agency's contention that Proposal 4 in the cited case violated the Act, we noted that the Comptroller General, in interpreting the Act, has held that "salaries of Government employees, as well as related items that flow from those salaries such as retirement fund contributions, are obligations of the Government at the time they are earned, that is, when the services are provided." In this case, insofar as the proposals can be said to concern specific sums, there is no obligation to make payments until the specific service is rendered by the unit employee. Hence, there is no showing that the proposals violate the Act.

6. *Agency Regulation*

The Agency asserts that the proposals violate Army Regulation (AR) 352-3, an Agency regulation for which it alleges a compelling need exists under section 2424.11(c) of the Authority's Rules and Regulations. Specifically, the Agency states that its regulations requires equality, to the maximum practicable extent, between the conditions of employment in the bargaining unit and those of teachers in comparable school systems in Georgia where Fort Stewart is located. In support of its position, the Agency cites 20 U.S.C. § 241(a)(2) which obligates the Agency to take whatever action is necessary to ensure that the education provided by its schools is comparable to that provided to children in similar communities in the same state.

Substantially the same argument was raised by the Agency to support its claim that there was a compelling need for AR 352-3 to bar negotiation of Proposal 4 in *Fort*

Knox Dependents Schools, 27 FLRA No. 34. In that case, we found "nothing in either the law or its legislative history which persuades us that Congress intended to restrict the Agency's discretion as to the particular employment practices which could be adopted." Consequently, we held that the Agency failed to sustain its burden of showing a compelling need for AR 352-3. Moreover, even assuming the Agency had supported its compelling need argument here, it has not shown how sections A through G, I and J of Proposal 1, which assume that pay rates will be fixed in accordance with pay practices in comparable schools systems, conflict with AR 352-3.

7. *Sections L and M of Proposal 1*

Sections L and M of Proposal 1 would require, respectively, that the Agency provide health insurance and basic life insurance free of cost to employees. These two sections are to the same effect as Proposals 14 and 17 found nonnegotiable in *Fort Bragg Unit of North Carolina Association of Educators, National Education Association and Fort Bragg Dependents Schools, Fort Bragg, North Carolina*, 12 FLRA 519 (1983). Noting that Federal law limits the amount of the employer's contribution toward the cost of health insurance, and specifically requires employees to contribute toward the cost of life insurance, the Authority held that the two proposals addressed matters provided for by Federal statutes. Because the statutory provisions cited in *Fort Bragg Dependents Schools* remain in effect, we must likewise find that sections L and M of Proposal 1 here concern matters provided for by law.

8. *Sections N and O of Proposal 1*

Section N of Proposal 1 would continue all health benefits currently accruing to employees even though not

specifically referred to in the negotiated agreement. Section O would ensure that all subsequent miscellaneous benefits bestowed on the Federal service would also be received by unit employees. The Agency's position appears to be that, because the sections concern matters covered by law, the two sections are not properly included in the negotiated agreement. We disagree. In *National Treasury Employees Union and International Revenue Service,* 3 FLRA 693 (1980) (Proposals II and III), two proposals sought to incorporate statutory provisions governing prohibited personnel practices and merit system principles into the parties' agreement. In that case the Authority held that the union could appropriately incorporate provisions of law in the negotiated agreement for the purpose of enforcing them by means of the negotiated grievance procedure. Here, the disputed sections seek to ensure that employees receive the enumerated benefit to which they are, or may be, entitled under law. Consequently, the reasoning set forth in *Internal Revenue Service* is applicable to sections N and O.

C. Conclusion

In accordance with the reasons and cases cited, Proposal 1, with the exception of sections L and M, and Proposal 2 do not conflict with law, applicable Government-wide regulations, or with Agency regulations for which there is a compelling need. Therefore, Proposal 1 with the exception of sections L and M, and Proposal 2 are within the duty to bargain. Sections L and M of Proposal 1 are inconsistent with Federal law and consequently are outside the duty to bargain under section 7117(a)(1) of the Statute.

III. Proposal 3

Proposal 3 concerns various types of leave. Because of its length, the proposal appears in an Appendix to this decision.

A. Positions of the Parties

The Agency takes the position that, with the exception of the section concerning leave without pay (section F), Proposal 3 addresses money-related fringe benefits and therefore is nonnegotiable for the same reasons as stated with regard to the Union's salary and benefits proposals. Section F assigns responsibility for approving leave without pay requests to the requester's immediate supervisor. Based on *American Federation of Government Employees, AFL-CIO, Local 32 and Office of Personnel Management,* 14 FLRA 278 (1984), *affirmed sub nom. Local 32, American Federation of Government Employees v. FLRA,* 762 F.2d 138 (D.C. Cir. 1985), among other cases, a proposal, such as section F, which prescribes a specific function to be performed by a person outside the bargaining unit is not within the duty to bargain.

The Union contends that this proposal also falls within the holding of *Fort Bragg Dependents School,* 12 FLRA 519 and consequently, it is negotiable.

B. Analysis and Conclusion

The issue of whether the various types of leave for teachers in the Agency's dependents schools are appropriate subjects for bargaining was examined in *Fort Knox Dependent Schools,* 26 FLRA No. 108. The first part of the disputed proposal in that case sought to establish the unit employees' right to sabbatical leave after 10 years' continuous service at Fort Knox. In deciding that the first part of the proposal was negotiable, we held that it "concerns a condition of employment about which the Agency has discretion under 20 U.S.C. § 241. Further, the first portion of the proposal does not conflict with 20 U.S.C. § 241 or with an Agency regulation for which a compelling need has been established by the Agency."

Consequently, based on the reasoning and cases cited in *Fort Knox Dependent Schools*, all but section F of Proposal 3 is within the duty to bargain.

Section F of Proposal 3 authorizes leave without pay (LWOP) for unit members. It further provides that LWOP "may be approved at the discretion of the immediate supervisor." The Agency contends that the latter requirement is an impermissible intrusion on its reserved right to assign work. We agree. In *American Federation of Government Employees, AFL-CIO, Local 32 and Office of Personnel Management*, 14 FLRA 278 (1984), *affirmed sub nom. Local 32, American Federation of Government Employees v. FLRA*, 762 F.2d 138 (D.C. Cir. 1985), the disputed proposal sought to require that any grievance initiated by the agency be signed by the agency head. The proposal was held to violate section 7106(a)(2)(B) of the Statute because it prescribed specific duties which particular nonbargaining unit personnel in the agency would perform. It was further noted that the proposal would effectively preclude management's assigning the duty referenced in the proposal to any other person, thereby eliminating the discretion inherent in management's right to assign work.

Here, section F of the proposal would assign approval authority for LWOP to specific management officials. Under its terms such authority could not be assigned to higher level officials who might be better positioned to assess the impact of a grant of LWOP upon the overall effectiveness of operations. Consequently, based on the reasoning and case cited in *Office of Personnel Management*, we find that section F of Proposal 2 is outside the duty to bargain because it is inconsistent with management's right to assign work under section 7106(a)(2)(B) of the Statute.

However, we note that if this section were revised to preserve management's right to designate the individual who would approve requests for LWOP, it would be negotiable. *See American Federation of Government Employees, AFL-CIO, Local 1858 and U.S. Army Missile Command, The U.S. Army Test, Measurement, and Diagnostic Equipment Support Group, The U.S. Army Information Systems Command, Redstone Arsenal Commissary*, 27 FLRA No. 14, slip op. at 13 (1987).

IV. Order

The Agency must upon request or as otherwise agreed to by the parties, negotiate over: Proposal 1 with the exception of sections L and M; Proposal 2; and Proposal 3, except for section F.[2] The petition for review is dismissed insofar as it pertains to sections L and M of Proposal 1 and section F of Proposal 3.

Issued, Washington, D.C., July 31, 1987.

/s/ Henry B. Frazier, III
HENRY B. FRAZIER III, Member

/s/ Jean McKee
JEAN MCKEE, Member

FEDERAL LABOR
RELATIONS AUTHORITY

[2] In finding these matters negotiable we make no judgment as to their respective merits.

Separate Opinion of Chairman Calhoun

I agree with my colleagues that the issues in this case are essentially the same as those in *Fort Knox Teachers Association and Fort Knox Dependent Schools,* 26 FLRA No. 108 (1987), *petition for review filed sub nom. Fort Knox Dependent Schools v. FLRA,* No. 87-3593 (6th Cir. June 25, 1987). In my opinion in that case, I stated that in the absence of a clear expression of congressional intent to make wages and money-related fringe benefits negotiable, I would find that these matters are not within the duty to bargain. In this case, Proposal 1, subsections A, D, E, F, G, I, J, K, N, and O, Proposal 2, and Proposal 3 concern wages and money-related fringe benefits. Because I find no expression of congressional intent in this case that these matters be negotiable, I would find these proposals to be outside the duty to bargain. I note, however, with respect to subsections A and D of Proposal 1 that consistent with the Authority's decision concerning Proposal 4 in *Illinois Nurses Association and Veterans Administration Medical Center, North Chicago, Illinois,* 27 FLRA No. 79 (1987), I would find negotiable a proposal which simply required the Agency to provide information to and consult with the Union on these matters.

I am unable to determine the meanings of subsections B, C, and H of Proposal 1 from the record in this case. In my view, there is insufficient information on which to make a negotiability determination on these subsections. I would dismiss the Union's petition as to them. In addition, I note that subsection C(6) of Proposal 3 is similar to section 8(g) of Provision 10, which the Authority found to be negotiable in *American Federation of Government Employees, AFL-CIO, Local 1770 and Department of the Army, Fort Bragg Dependent Schools, Fort Bragg, North Carolina,* 28 FLRA No. 66 (1987). Unlike the provision in

that case, which required the continuation of insurance premiums "in accordance with Federal regulations," Proposal 3 in this case does not refer to applicable regulations. As such, it would constitute an independent contractual requirement concerning the matter in my view.

I agree with my colleagues that subsections L and M of Proposal 1 concern matters provided for by Federal law.

Issued, Washington, D.C., July 31, 1987.

/s/ Jerry L. Calhoun

JERRY L. CALHOUN, Chairman

FEDERAL LABOR
RELATIONS AUTHORITY

APPENDIX

Proposal 3

Article 11: Leave

Section 1. Sick and annual leave for Unit Members whose services are required for twelve (12) months will accrue and be granted in accordance with the Annual and Sick Leave Act of 1951, as amended 5 USC Chapter 63 and applicable Civilian Personnel Regulations.

Section 2. Sick leave, annual leave, administrative, and other types of leave for those Unit Members whose services are not required for twelve (12) months will be administered as follows:

A. *Sick Leave.* Unit members shall accumulate sick leave at a rate of four (4) hours per pay period not to exceed thirteen (13) days shall be accredited to Unit Members at the beginning of the school year. Sick leave will accumulate without limit and can be taken for any time during the school year, but payment for sick leave taken in excess of that earned will be recovered. No accrued sick leave shall be carried over to any succeeding period when there is a break in federal employment in excess of three (3) continuous years.

1. Sick leave will be granted for the following purposes:

(a) medical, dental or optical examination or treatment;

(b) sickness or injury;

(c) medical disability connected with pregnancy;

(d) exposure to a contagious disease;

(e) illness of a member of the immediate family or near relative who resides in the same household or for whom the employee is financially responsible;

(f) death of an immediate family member or near relative.

2. As used in this section, immediate family shall mean spouse, grandparent, parent-in-law, child, grandchild, or sibling. Near relative shall include immediate family and extend to first cousin, aunt, uncle, niece, nephew, brother-in-law, daughter-in-law, or son-in-law.

3. In the cases requiring a substitute teacher, absence chargeable to sick leave will be for not less than four (4) hours. When no substitute is employed, sick leave will be taken in multiples of one hour. The decision as to whether a substitute is required shall be made solely by management officials.

4. Unit members must obtain approval from the principal before sick leave that has not been accrued can be used.

5. Unit members may be required to provide a doctor's statement in the case of a period of absence which exceeds five (5) consecutive days.

6. Upon retirement, credit for unused sick leave shall be administered in accordance with FPM Supplement 831-1 Subchapter S3-7.

7. The Employer and Association shall meet by November fifteen (15) to discuss the establishment of a sick leave bank.

B. *Personal Leave*

1. During any school year, a unit member may utilize up to a maximum of three days of accumulated sick leave for personal reasons. Notification of the use of such leave will be made one (1) day in advance. Two (2) days of personal leave may be carried over to the next year for a maximum of five (5) personal days.

2. No personal leave will be taken on the day before or immediately after spring vacation, testing days, nor on inservice days or conference days unless such leave has been approved by the Superintendent.

3. Personal leave will be for not less than four (4) hours in those cases where a substitute teacher is employed. When no substitute is employed, personal leave will be taken in multiples of one hour. The decision as to whether a substitute is required shall be made solely by management officials.

C. *Professional Leave of Absence.* Professional leave of absence may be granted by the Employer subject to the following:

1. After five (5) years of continuous service at Fort Stewart, sabbatical leave of absence without pay may be granted for up to one (1) employee per school year at the discretion of the Employer. Such leave shall be granted for the purpose of advanced study, research, professional writing, or other experience of recognized value in an employee's respective field.

2. Applications will be submitted to the Superintendent of Schools not later than 1 April

of the school year prior to the year the leave is to be taken. Applications will include:

(a) reason for leave;

(b) proposed length of time;

(c) where leave will be spent;

(d) outline of studies of activities to be taken.

3. Professional leave of absence will normally be granted for one (1) school year. Leave may be granted for a semester.

4. While in a leave status, employees will not be eligible to accrue sick leave but will be entitled upon return to duty to any sick leave accrued prior to the professional leave. Upon return to duty, the employee will be entitled to advance one (1) step on the salary schedule, if the studies or activities as proposed when the leave was granted have been completed.

5. Unit members will not accrue seniority but will be entitled upon return to duty any seniority accrued prior to the professional leave.

6. While in a leave status employees may continue their participation in the health and life insurance programs by payment of required premiums.

7. Unit members may utilize up to a maximum of five (5) days with pay per school year for education related purposes, such as school visitations, conferences, and workshops. Approval for the above leave shall be granted by the Superintendent.

D. *Court Leave.* Employees serving on jury duty or subpoenaed to court shall be carried on court

leave without financial loss or loss of sick or annual leave.

1. An employee on court leave may not receive fees for jury service on regular workdays in a Federal court. The employees may receive and retain fees for such duty performed on non-workdays or on holidays on which the employee would otherwise have been excused from work.

2. An employee on court leave will accept fees received from state or municipal courts and turn them in to the Civilian Pay Section of Fort Stewart Finance and Accounting Office. The employee may retain pay received for travel and subsistence expenses. Fees received for jury duty service performed outside normal duty hours or on holidays on which the employee would otherwise have been excused may be retained.

E. *Maternity/Paternity/Adoption Leave.* Maternity, paternity, and adoption leave will be administered as follows:

1. For female employees having a child, accumulated sick leave may be used one and one half (1½) months prior to having the child upon presentation of a certificate of incapacity. Once the child is delivered the employee may use sick leave up to a period of one and one half (1½) months after the child is delivered. Once the one and one half (1½) months of sick leave have been exhausted and the employee still desires further time away from work, the employee will be granted leave without pay. In no case will leave without pay be granted for more than one (1) year.

2. For male employees who desire to stay at home with their child, leave without pay may be granted for a period not to exceed one (1) year. A male employee may also make use of personal leave (see Section 1, paragraph b of this Article) for paternity leave.

3. For any employee who desires to stay at home with an adopted child, leave without pay may be granted for a period not to exceed one (1) year. Leave without pay may be taken prior to finalization of the adoption if such leave is necessary to take part in court proceeding or other action relating to the adoption. Personal Leave (Section 1, paragraph b of the Article) may also be utilized.

4. An employee shall make known intent to request leave including the type of leave, approximate dates, and anticipated duration to allow the Employer to prepare for any staffing adjustments which may be necessary.

F. *Leave Without Pay (LWOP).*

1. LWOP is requested by an employee and may be approved at the discretion of the immediate supervisor.

2. Leave without pay may be granted to unit members for the following reasons:

(a) educational leave or travel;

(b) such other reasons as are approved by the Superintendent

3. The minimum charge of LWOP is one (1) hour and additional charges in multiples of one (1) hour.

4. Maximum amount of LWOP that may be taken during one (1) school year is one (1) month except as provided in Section 1, paragraph e (Maternity/Paternity/Adoption Leave).

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 87-8734

FORT STEWART SCHOOLS, PETITIONER, CROSS-RESPONDENT

v.

FEDERAL LABOR RELATIONS AUTHORITY, RESPONDENT, CROSS-PETITIONER

FORT STEWART ASSOCIATION OF EDUCATORS, INTERVENOR

On Petition for Review of an Order of the Federal Labor Relations Authority

ON PETITIONS FOR REHEARING AND SUGGESTIONS OF REHEARING IN BANC

(Opinion November 21, 11 Cir., 1988, __ F.2d __).
(February 17, 1989)

[Filed Feb. 17, 1989]

Before VANCE and HATCHETT, Circuit Judges, and NESBITT*, Senior District Judge.

PER CURIAM:

(X) The Petitions for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be

* Honorable Lenore C. Nesbitt, U.S. District Judge for the Southern District of Florida, sitting by designation.

polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestions of Rehearing In Banc are DENIED.

( ) The Petitions for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestions of Rehearing In Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause in banc, and a majority of the judges in active service not having voted in favor of it, Rehearing In Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Joseph W. Hatchett
JOSEPH W. HATCHETT
United States Circuit Judge

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* Honorable Lenore C. Nesbitt, U.S. District Judge for the Southern District of Florida, sitting by designation.

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(2)

No. 89-65

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

FORT STEWART SCHOOLS,
Petitioner
v.
FEDERAL LABOR RELATIONS AUTHORITY AND
FORT STEWART ASSOCIATION OF EDUCATORS

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF FOR RESPONDENT FORT STEWART ASSOCIATION OF EDUCATORS IN OPPOSITION

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BRIEF FOR RESPONDENT FORT STEWART ASSOCIATION OF EDUCATORS IN OPPOSITION

REASONS FOR DENYING THE PETITION

Review is not warranted because the court below correctly decided the issues presented here and because the issues are of relatively minor importance in light of the small number of federal employees impacted by this and other decisions concerning the right of federal employees to negotiate over wages.

1. The Eleventh Circuit's decision in *Fort Stewart Schools* will not have a significant impact because of the small number of teachers employed by the Army's Section 6 schools. There are only 187 teachers and teacher aides at Fort Stewart whose bargaining rights are affected. There

are 50 teachers at the West Point Elementary School who bargain collectively, 14 at Fort Rucker, 245 at Fort Bragg and 240 at Fort Knox. OFFICE OF PERSONNEL MANAGEMENT, UNION RECOGNITION IN THE FEDERAL GOVERNMENT, 155, 175, 198 (1987). The teachers at the other Section 6 schools administered by the Army at Fort Jackson, Fort Campbell, Fort Benning and Fort McClellan are not organized. There are also 110 teachers who bargain collectively with the Marine Corps, which administers a Section 6 school at Quantico, Virginia. UNION RECOGNITION at 291. The teachers who bargain collectively at the Section 6 schools administered by the Navy in Puerto Rico have not sought to negotiate over pay because 20 U.S.C. § 241(a) specifically provides that teachers employed at Section 6 schools outside the continental United States are to be paid the same as teachers in the District of Columbia public schools.

There are not "forty-odd" categories of federal employees whose salary is not fixed by statute and who will be able to negotiate over wages under the Federal Labor Relations Authority's decisions, such as the one enforced by the Eleventh Circuit. They are not "a large and diverse group" as the petitioner characterizes them but represent considerably less than 1% of the federal workforce.

The reference to "forty-odd pay systems which are not entirely fixed by statute" that appears in the Fort Stewart Schools' petition and in *Department of Defense Dependents Schools v. FLRA*, 863 F.2d 988, 989 (D.C. Cir. 1988), *reh'g en banc granted* (Feb. 6, 1989), is a citation to *American Federation of Government Employees and Department of the Air Force, Eglin Air Force Base*, 24 F.L.R.A. 377 (1986), in which Authority Chairman Calhoun apparently refers to a 1976 Staff Report of the President's Panel on Federal Compensation that identifies forty-three "administratively determined salary

schedules" and "wage schedules."[1] However, included on that list, which is reproduced in the appendix to this brief, are employees of agencies now defunct, such as the Energy Research and Development Administration and the Alaska Railroad. The list also includes employees of the Tennessee Valley Authority, the Central Intelligence Agency, the National Security Agency and the Federal Bureau of Investigation, which are excluded from coverage of the Federal Service Labor-Management Relations Statute by 5 U.S.C. § 7103(a)(3). Also included on this list are categories of supervisory or managerial employees who do not bargain under the FSLMR Statute,[2] along with numerous categories of temporary employees and those who would not constitute separate bargaining units.[3] Finally, the list also includes five categories of employees who are "prevailing rate employees." That is to say, they are employees whose pay is fixed by either the Prevailing Rate Act or a similar law that requires their employing agency to compensate them in accordance with the prevailing rate of wages paid to similar employees in the private sector.[4] Both courts that have considered

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[1] *See Department of the Navy, Military Sealift Command v. FLRA*, 836 F.2d 1409, 1417 n.15 (3rd Cir. 1988).

[2] Such as the chief examiners of the Board of Patent Appeals.

[3] Such as temporary census takers, noncitizen wage earners, student medical interns, Youth Employment Program workers and Justice Department special attorneys. The list also includes experts and consultants employed by individual personal service contracts who are covered by procurement laws instead of the FSLMR Statute.

[4] E.g., Panama Canal employees, 22 U.S.C. § 3655(b); the civilian staff at the Uniformed Services University of Health Services, 10 U.S.C. § 2113(f); Bureau of Printing and Engraving employees, 5 U.S.C. § 5349; maritime employees, 5 U.S.C. § 5348; and employees in the federal wage grade system, 5 U.S.C. chapter 53, subchapter IV. The Overseas Teachers Pay and Personnel Practices Act, 20 U.S.C. § 901 *et seq.*, requires the Secretary of Defense to set the "basic compensation" of teachers in DOD's overseas de-

the question have ruled that the salaries of prevailing rate employees are "matters [that] are specifically provided for by Federal statute" and are thus outside the duty to bargain under § 7103(a)(14)(c) of the FSLMR Statute, regardless of whether they would otherwise be a bargainable "condition of employment." *Department of the Treasury, Bureau of Engraving and Printing v. FLRA*, 838 F.2d 1341 (D.C. Cir. 1988); *Military Sealift Command*. The Federal Labor Relations Authority has now adopted that interpretation and has held that pay proposals made by prevailing rate employees are nonnegotiable, unless the employees are specifically covered by a "grandfather clause" in § 704 of the Civil Service Reform Act, which allows those prevailing rate employees who negotiated over wages before the enactment of the Prevailing Rate Act in 1972 to continue to do so. *Army and Air Force Exchange Service, Dallas, Texas and AFGE*, 32 F.L.R.A. 591 (1988).

The Classification Act exempts only twenty-seven categories of employees and nine agencies from its coverage and thus provides a more reliable and current indication of the number of categories of employees whose pay is not fixed by statute. 5 U.S.C. § 5102. Most of the categories of employees excluded from the Classification Act, however, are either employed in an agency also excluded from the coverage of the FSLMR Statute by § 7103(a) or covered by some form of prevailing rate law or individualized pay statute.

In short, the numbers of federal employees whose pay is truly within administrative discretion and who have collective bargaining rights are few. In addition to teachers and staff in DOD dependents schools, the only other federal

pendents schools in accordance with the range of rates paid to teachers in stateside urban school districts. The issue of whether these teachers can negotiate over extra-duty and summer-school compensation is pending in *Department of Defense Dependents Schools*.

employees who are asserting bargaining rights on pay issues are those prevailing rate employees covered by the grandfather clause of § 704 (whose bargaining rights are not in dispute); a unit of 74 faculty members at the U.S. Merchant Marine Academy at Kings Point, New York;[5] six units totalling 1,141 employees of the Federal Deposit Insurance Corporation;[6] and a unit of approximately 2,190 employees of the Nuclear Regulatory Commission. UNION RECOGNITION at 393, 409, 434. However, the Court of Appeals for the Fourth Circuit recently held *en banc* that NRC employees may not negotiate over pay because, *inter alia*, the Atomic Energy Act, 42 U.S.C. § 2201(d), grants the Commission only limited authority to deviate from the Classification Act in setting pay rates. *Nuclear Regulatory Commission v. FLRA*, No. 87-3182 (4th Cir. July 14, 1989).

2. The court of appeals decided each of the three questions in this case correctly.

a. An examination of the language of the FSLMR Statute reveals that wages are a negotiable condition of employment unless they are specifically provided for by statute. Federal employees have the right "to engage in collective bargaining with respect to conditions of employment." 5 U.S.C. § 7102. "Conditions of employment" is in turn defined as:

> . . . personnel policies, practices, and matters, whether established by rule, regulation, or otherwise,

[5] The Maritime Education and Training Act of 1980 provides that the Secretary of Transportation may employ faculty at the academy without regard to the provisions of Title 5 and may pay faculty members "without regard to the provisions of chapter 51 and subchapter III of chapter 53 of such title (relating to classification and General Schedule pay rates)." 46 U.S.C. § 1295g(d).

[6] Congress has granted to the FDIC the power "to appoint by its Board of Directors such officers and employees as are not otherwise provided for in this chapter, to define their duties [and] fix their compensation. . . ." 12 U.S.C. § 1819.

affecting working conditions, except that such term does not include policies, practices and matters—

(A) relating to political activities prohibited under subchapter III of chapter 73 of this title;

(B) relating to the classification of any position; or

(C) to the extent such matters are specifically provided for by Federal statute.

5 U.S.C. § 7103(a)(14). Nowhere is the right to negotiate wages excluded from the definition of "conditions of employment" unless the employee's wages "are specifically provided for by Federal statute." If Congress intended to exclude bargaining on wages under all circumstances, it could easily have included wages among these three exclusions or phrased exclusion (B) to read "relating to the *pay* and classification of any position."

It would be specious to suggest, as petitioner has, that "working conditions" are limited to the physical circumstances under which an employee performs his job, such as job safety and office environment. This would exclude the bulk of subject matters presently negotiated by federal sector unions, including personnel policies and practices involving equal employment opportunity, merit promotion, training and career development, work scheduling, discipline, and the negotiation of grievance and arbitration procedures made mandatory by § 7121(a)(1). If Congress had intended the definition of "conditions of employment" to be so limited, there would have been no need to exclude from the definition "political activity" and "position classification." How can it be said that pay is not a working condition but that position classification, from which pay flows for most federal employees, is?

An examination of the language of the National Labor Relations Act also demonstrates that an employee's pay is both a "working condition" and a "condition of em-

ployment" in common and Congressional parlance. In the third paragraph of Section 1 of the NLRA, "Findings and declaration of policy," 29 U.S.C. § 151, Congress specifically cites wages and hours as two of the working conditions over which collective bargaining should take place:

> Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment or interruption, and promotes the flow of commerce . . . by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to *wages, hours or other working conditions* . . .

(emphasis supplied). In Section 9(a) of the NLRA, 29 U.S.C. § 159, Congress included rates of pay and wages as examples of the conditions of employment over which exclusive representatives had the right to bargain:

> Representatives designated or selected for the purposes of collective bargaining by the majority of employees in the unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to *rates of pay, wages, hours of employment, or other conditions of employment*: . . .

(emphasis supplied). The use by Congress of the words "or other" between "wages" and "working conditions" and between "rates of pay, wages" and "conditions of employment," rather than simply the word "or," demonstrates that Congress considered the latter term to encompass the former.[7]

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[7] In *Department of Defense Dependents Schools*, Judge Starr quoted the language of § 8(d) of the NLRA, 29 U.S.C. § 158(d), which requires both unions and employers to negotiate in good faith over "wages, hours and other terms and conditions of employment," and concluded, without reference to any authority, that

b. The origin of the phrase "personnel policies, practices and matters . . . affecting working conditions" in § 7103 is no mystery. It was adopted verbatim from the earlier Executive orders governing collective bargaining in the federal sector. The FLRA's predecessor, the Federal Labor Relations Council, held that wages were a negotiable working condition for employees whose compensation was not set by statute. The legislative history of the FSLMR Statute demonstrates that Congress's primary intent in enacting the statute was to codify the practices that arose under the Executive orders that had governed labor relations in the federal sector without any diminution in the scope of bargaining.

There is a long history of collective bargaining over wages in the federal sector. At least as early as 1949, Congress exempted skilled craftsmen and semiskilled manual laborers from the Classification Act, which set federal employees' pay. Pub. L. No. 429, ch. 782, § 201, 63 Stat. 954 (Oct. 28, 1949). The Bureau of Reclamation in the Department of Interior voluntarily bargained over wages for such employees with such unions as the IBEW since the late 1940s. *U.S. Department of Energy, Western Area Power Administration, Golden Colorado and IBEW Locals 640, et al.*, 22 F.L.R.A. 758, 802-803 (1986).

In 1961, President Kennedy appointed a task force, chaired by Secretary of Labor Arthur Goldberg, to formu-

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wages were a negotiable *term*, but not a *condition*, of employment. 863 F.2d at 991 n.3. This faulty analysis ignored the fact that wages are referred to only as a condition of employment in the following section of the NLRA, and the fact that § 8(d) was not added to the NLRA until the Taft-Hartley amendments of 1947, some fourteen years after the NLRA was originally enacted as the Wagner Act of 1933. Congress added § 8(d) in order to impose a mutual obligation to bargain in good faith on both employers and unions, where the Wagner Act imposed such a duty on the employer only. T. KHEEL, 4 LABOR LAW § 16.02[2] (1979). Section 8(d) did not change the scope or subject matter of bargaining in any way.

late recommendations on a governmentwide labor relations policy. The task force reported that numerous agencies had voluntarily recognized employee organizations and that the Tennessee Valley Authority and several components of the Department of Interior had developed "relationships that are close to full scale collective bargaining" with trade unions. PRESIDENT'S TASK FORCE ON EMPLOYEE-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE, A POLICY FOR EMPLOYEE-MANAGEMENT COOPERATION IN THE FEDERAL SERVICE (1961) *reprinted in* House Comm. on Post Office and Civil Service, Subcomm. on Postal Personnel and Modernization, 96th Cong., 1st Sess., *Legislative History of the Federal Service Labor-Management Relations Statute*, 1187 (1979). The task force's report noted that "[t]he employer in most parts of the Federal Government cannot negotiate on pay, hours of work or most fringe benefits" because "[t]hese are established by law." *Id.* at 1200. The task force recommended a government-wide labor relations program that would permit bargaining over wages if not otherwise set by statute:

> Specific areas that might be included among subjects for consultation and collective negotiations include the work environment, supervisor employee relations, work shifts and tours of duty, grievance procedures, career development policies *and where permitted by law the implementation of policies relative to rates of pay and job classification.*

Id. at 1201 (emphasis added).

In a statement accompanying the published version of the task force report, President Kennedy directed that an Executive order be prepared to effectuate the task force's recommendations and noted "that where salaries and other conditions of employment are fixed by the Congress these matters are not subject to negotiation." *Id.* at 1178. Thus, those who developed the first government-wide labor relations program intended that "salaries" were to be

among the negotiable "conditions of employment" unless they were set by Congress.

Section 6(b) of Executive Order No. 10,988, 27 Fed. Reg. 551 (1962), *reprinted in* 1962 U.S. CODE CONG. & AD. NEWS 4269, 4271, issued by President Kennedy, authorized negotiations over "personnel policy and practices and matters affecting working conditions"—the same language that now appears in the FSLMR Statute at 5 U.S.C. § 7104(14). President Nixon revised the federal government's labor relations program by Executive Order No. 11,491, 43 Fed. Reg. 17605 (1969). Section 11 of this Executive order required agencies to negotiate "with respect to personnel policies and practices and matters affecting working conditions, so far as may be appropriate under applicable laws and regulations. . . ." Section 4 of Executive Order No. 11,491 established the Federal Labor Relations Council, comprised of the chairman of the Civil Service Commission, the Secretary of Labor, and an OMB official, and authorized it to resolve disputes governing the negotiability of collective bargaining proposals.

In 1972 the FLRC was called upon to resolve a negotiability dispute concerning the Department of Commerce's obligation to negotiate over a wage increase for professors at the Merchant Marine Academy. In *United Federation of College Teachers, Local 1460 and U.S. Merchant Marine Academy*, 1 F.L.R.C. 211 (1972), the FLRC found that instructors at the academy were exempt from the Classification Act and that their salary proposals did not conflict with other federal law, as was alleged by the Department of Commerce. The FLRC specifically held that the two wage proposals at issue were "negotiable as 'personnel policies and practices and matters affecting working conditions' under section 11(a) of the Order." 1 F.L.R.C. at 218. In another case, the FLRC held that several pay proposals made by another teachers' association were negotiable under Executive Order No. 11,491 because they did not conflict with the Overseas

Teachers Pay and Personnel Practices Act. *Overseas Education Association, Inc. and Department of Defense Dependents Schools*, 6 F.L.R.C. 231 (1978).

The enactment of the FSLMR Statute in 1978 "constitute[d] a strong congressional endorsement of the policy on which the federal labor relations program had been based since its creation in 1962." *Bureau of Alcohol, Tobacco and Firearms v. FLRA*, 464 U.S. 89, 103 (1983). It is clear from the legislative history that Congress intended to expand, rather than constrict, the scope of bargaining that existed under the Executive orders. *National Treasury Employees Union v. FLRA*, 691 F.2d 553, 559 (D.C. Cir. 1982); *New York Council, Association of Civilian Technicians v. FLRA*, 757 F.2d 502, 508 (2d Cir. 1985), *cert. denied*, 474 U.S. 846 (1988).[8]

The Senate Report stated that "[t]he scope of negotiations under this section is the same as under section 11(a) of Executive Order 11491." S. Rep. No. 95-969, 95th Cong., 2d Sess. 104 (1978), *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS at 2826. Representative Derwinski stated that Title VII was intended to codify the existing bargaining practices, which developed under the Executive orders:

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[8] During early debate, Representative William Ford termed the expansion in the scope of bargaining "a very modest, incremental step." 124 Cong. Rec. 25,777 (1978). In later debate he stated that "the scope of bargaining would be substantially broadened from that permitted agency management under the [Executive] order." 124 Cong. Rec. 29,198 (1978). Representative Clay stated that in drafting Title VII of the Civil Service Reform Act, which became the FSLMR Statute, "the committee intended that the scope of bargaining under the act would be greater than that under the order as interpreted by the [Federal Labor Relations] Council." 124 Cong. Rec. 29,187 (1978). *See also* Supplemental Views to H.R. 11280, H.R. Rep. 95-1403, 95th Cong., 2d Sess. 377 (1978) (Title VII "broaden[s] the scope of bargaining beyond existing practices.").

> [T]he amendment is simply the administration's proposal for a flexible but orderly codification of the Executive orders which have successfully governed Federal labor-management relations since 1962. Four Presidents, two of each party, have managed to work with the guidelines embodied in this substitute, and now their successor has offered to codify the system into statutes which cannot, like Executive orders, be revoked by the White House at will.
>
> The substance of this amendment closely resembles the original program established by President Kennedy.

124 Cong. Rec. 29,188 (1978).

Thus, when it enacted the FSLMR Statute, Congress intended to preserve any and all collective bargaining rights that federal employees enjoyed under the Executive orders—including, in limited circumstances, the right to bargain over wages. When referring to the right of prevailing rate employees to negotiate over wages, Representative Ford stated, "we should not now be narrowing the preexisting collective bargaining rights of *any group* of Federal employees." 124 Cong. Rec. H8468 (daily ed. Aug. 11, 1978) (emphasis added). Congress is generally presumed to be knowledgeable about existing law pertinent to the legislation it enacts. *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, (1988). When Congress adopts a new law incorporating sections of a prior law, Congress is presumed to know both the judicial and administrative interpretations of the incorporated law. *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978). When Congress codified without change language contained in Executive Order 11,491, it knew of and did not intend a change in the judicial and executive interpretation of that language. *Florida National Guard v. FLRA*, 699 F.2d 1082, 1087 (11th Cir. 1983); *United States v. PATCO*, 653 F.2d 1134, 1138 (7th Cir. 1981). "One such existing practice allowed federal employees to negotiate wages in the rare instances where Congress did not specifically establish

wages and fringe benefits." *Fort Stewart Schools*, 860 F.2d at 402 (citing *United Federation of College Teachers, Local 1460 and U.S. Merchant Marine Academy*, 1 F.L.R.C. 211 (1972) and *OEA and DODDS*, 6 F.L.R.C. 231 (1978)).

The petitioner has cited and analyzed the legislative history of the FSLMR Statute out of context. Although the Senate report does state that Title VII "excludes bargaining on economic matters," in the paragraphs immediately preceding that statement the Senate report makes clear that any collective bargaining rights that existed under Executive Order 11,491 were to be preserved by the new law:

> S. 2640 incorporates into law the existing Federal employee relations program. . . .
>
> The basic, well-tested provisions, policies and approaches of Executive Order 11491, as amended, have provided a sound and balanced basis for cooperative and constructive relationships between labor organizations and management officials. Supplemented by the Federal Labor Relations Authority to administer the program, and expanded arbitration procedures for resolving individual appeals, these measures will promote effective labor-management relationships in Federal agencies.

Senate report, *id.*, at 12. Immediately preceding Representative Udall's statement that "we do not permit bargaining over pay," Mr. Udall also states that the statute "gives Federal employees greater rights in labor relations than they have heretofore enjoyed." 124 Cong. Rec. 25,716 (1978). Similarly, although Representative Clay stated that "employees still . . . cannot bargain[] over pay," he also stated immediately afterward that the statute adopted a position that "moves slightly beyond" existing bargaining practices. 124 Cong. Rec. 24,286 (1978). Although Senator Sasser stated that "Federal employees may not bargain over pay or fringe benefits," he was de-

scribing, however mistakenly, the practice under Executive Order 11,491, *not* the new FSLMR Statute.[9]

When the legislative history is read in both its immediate and historical context, it is clear that the statements were merely assurances that, as a general rule, wages would continue to be nonnegotiable for the overwhelming majority of federal employees whose pay is set by statute. For example, Representative Ford stated that "no matters that are governed by statute (such as pay, money-related fringe benefits, retirement and so forth) could be altered by a negotiated agreement." 124 Cong. Rec. 25,777 (1978). Representative Udall stated that "[t]here is not really any argument in this bill or in this title about federal collective bargaining for wages and fringe benefits and retirement. . . . All these major regulations about wages and hours and retirement and benefits will continue to be established by law through Congressional action." 124 Cong. Rec. 29,182 (1978). The court of appeals correctly concluded that:

> A close examination of the Congressional reports and debates reveals that the FSLMRA's supporters made these statements with the understanding that Congress generally regulates such matters through its prevailing rate acts, not with the understanding that the FSLMRA barred all wage negotiations. . . . Thus, although some legislators' remarks baldly assert that wages are not negotiable, the above comments indicate that the legislators merely were assuring their peers that the FSLMRA would not supplant specific laws which set wages and benefits.

Fort Stewart Schools, 860 F.2d at 401.

On the other hand, the legislative history reaffirms the principle, recognized as early as 1961 by the Goldberg task force, that any matters that are not specifically provided for by statute are negotiable. Representative Clay stated during debate:

> Section 7103(a)(14)(D), removing from subjects of bargaining those matters specifically provided for by Federal statute, was adopted by the Committee and retained in the Udall substitute with the clear understanding that only matters "specifically" provided for by statute would be excluded under this subsection. Thus, where a statute merely vests authority over a particular subject with an agency official given discretion in exercising that authority, the particular subject is not excluded by this subsection from the duty to bargain over conditions of employment.

124 Cong. Rec. 29,187 (1978).

c. The fact that Congress specifically authorized certain prevailing rate employees to negotiate over pay in § 704 of the Civil Service Reform Act of 1978, 5 U.S.C. § 5343 note, does not indicate an intention to foreclose other employees from bargaining over pay. The Prevailing Rate Act, 5 U.S.C. § 5343, provides that the salaries of certain skilled craftsmen "shall be fixed and adjusted from time to time as nearly as is consistent with the public interest in accordance with prevailing rates" paid to similar crafts in the private sector. As noted earlier, before the Prevailing Rate Act was enacted in 1972, many of the skilled craftsmen now covered by the Act negotiated over wages. Section 9(b) of the act, Pub. L. No. 92-392, permitted those employees covered by the Prevailing Rate Act who negotiated over pay prior to its

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[9] In context, the quote from Senator Sasser reads:

> Currently, Federal labor relations are governed by Executive Order 11491, as amended. The Executive order establishes the right of Federal employees to belong to unions and establishes procedures for the recognition of bargaining units. But the Federal labor relations program continues to differ in substantive ways from that of the private sector.
>
> For one, Federal employees are not allowed to strike. Also, exclusive representatives of Federal employees may not bargain over pay or fringe benefits.

124 Cong. Rec. 27,549 (1978).

enactment to continue to do so. 5 U.S.C. § 5343 note. When Congress enacted the Civil Service Reform Act of 1978 it provided in § 704 that those employees who continued wage negotiations pursuant to § 9(b) could continue to do so notwithstanding the Prevailing Rate Act, the premium pay provisions of Title 5 and any contrary provision of the FSLMR Statute.[10] But not for this "grandfather" clause, these prevailing rate employees would no longer be able to negotiate over wages under the FSLMR Statute because their pay would be a matter "specifically provided for by Federal statute," 5 U.S.C. § 7103(a)(14)(c), namely the Prevailing Rate Act. Indeed, the FLRA has held that other Prevailing Rate Act employees who did not bargain over wages prior to 1972 are now foreclosed from doing so for this reason. *Army and Air Force Exchange Service, Dallas, Texas and AFGE*, 32 F.L.R.A. 591, 597, 600 (1988). Thus, § 704 was needed as an exception to the general rule that employees whose salaries are set by statute may not negotiate over wages; it has no bearing on the bargaining rights of those employees who are not subject to a pay-fixing statute.

Section 704 was also enacted to specifically overrule the effect of two Comptroller General decisions affecting Prevailing Rate Act employees, and cannot therefore be taken as an indication of a desire by Congress to limit, by omission, the bargaining rights of other employees. In those decisions, the Comptroller General held that although § 9(b) exempted employees in certain bargaining units from the Prevailing Rate Act, the overtime provisions of 5 U.S.C. §§ 5541-5550 were still applicable and

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[10] There are twenty bargaining units of Prevailing Rate Act wage grade employees represented by craft unions, such as the International Brotherhood of Electrical Workers and the Columbia Power Trades Council, that gained recognition before 1972 and are thus grandfathered by § 704. UNION RECOGNITION at 331-332, 351-362, 390.

beyond the scope of bargaining. During debate, Congressman Ford stated:

> During committee mark-up, I offered an amendment to add a new provision, section 704(c), which is intended to preserve the scope of collective bargaining heretofore enjoyed by certain trade and craft employees . . . This provision is required because of two recent rulings by the Comptroller General which invalidated certain collectively bargained provisions and held that specific legislative authorization is necessary for these employees to continue to negotiate such provisions in accordance with prevailing private industry practice. Decisions Nos. B-189782 (February 3, 1978) and B-191520 (June 6, 1978).

124 Cong. Rec. 25722 (1978). *See also* H.R. Rep. No. 1717, 95th Cong., 2d Sess. 159 (1978). Thus, § 704 was added to overcome a roadblock to the bargaining rights of particular employees rather than as an exhaustive list of those employees who could negotiate over pay issues.

d. If Congress intended employees such as dependents school teachers to continue to negotiate over wages, it would not have intended a construction of § 7106(a)(1) that would foreclose such bargaining. In any case, § 7106(a)(1) grants management the right to "determine" its budget. Proposals that merely have an economic cost without being budget determinative are negotiable. Virtually any collective bargaining proposal has some cost and impacts an agency's budget, including arbitration procedures and negotiations themselves.

The Army has no support for its argument that whether the union's proposals would significantly increase costs should be tested "by comparison with the costs of the program employing the bargaining unit employees, not the entire agency budget." The plain language of the statute is to the contrary. Section 7106(a) states that "nothing in this chapter shall affect the authority of any

management official of any agency—to determine the . . . budget . . . *of the agency.*" (emphasis added). "Agency" is defined by the statute as "an Executive agency." 5 U.S.C. § 7103(a)(3). For the purposes of title 5, "Executive agency" means an Executive Department, a Government corporation and an independent establishment. 5 U.S.C. § 105. The Department of Defense is an Executive Department and thus an Executive agency; the Fort Stewart school system is not. 5 U.S.C. § 101.

The union's proposals do not entail an unavoidable increase in costs, even if judged on a schoolwide basis. First, presumably the salaries of the teachers in the Georgia public schools are raised annually. Therefore, at least part of the 13.5% salary increase sought was going to be incurred by the agency anyway because the Army pegs Fort Stewart teachers' salaries to those paid in local school districts. Second, higher salaries attract better, harder-working teachers, which would in turn permit the Fort Stewart schools to increase the pupil-teacher ratio slightly without any detriment to the overall quality and total cost for salaries at Fort Stewart. As an alternative, other aspects of the Fort Stewart schools' administrative program could be cut, such as support staff and administrator salaries. And, of course, if the Fort Stewart schools lack financial ability to pay a 13.5% teacher salary increase within the Army's budget authority without adversely impacting its educational program, it should refuse to agree to the proposal and make its arguments to the Federal Service Impasses Panel pursuant to 5 U.S.C. § 7119(b). Budget and financial constraints of a public sector employer are precisely the kinds of factors considered in interest arbitration and impasse resolution. F. ELKOURI & E. ELKOURI, HOW ARBITRATION WORKS, 832-835 (4th ed. 1985).

e. Whether the Army has a compelling need for Army Reg. 352-3, 1-7, so as to preclude negotiations over proposals that conflict with the regulation's terms, certainly

is not a question warranting review by this Court. This issue only impacts the 736 teachers who bargain at five Army bases.

Proposals that conflict with an agency regulation are negotiable unless the agency demonstrates a "compelling need" for adherence to the regulation. 5 U.S.C. § 7117(a)(2). In order to demonstrate a "compelling need" the Army must demonstrate that either:

> The rule or regulation is essential, as distinguished from helpful or desirable, to the accomplishment of the mission or execution of functions of the agency . . .
>
> [or] the rule or regulation implements a mandate to the agency . . . under law . . . which implementation is essentially nondiscretionary in nature.

5 C.F.R. § 2424.11(a), (c).

Although § 241(a) requires education at the Fort Stewart schools to be comparable to that in local public schools, it does not require that salaries paid to teachers be the same. The Army has not even demonstrated that this regulation is helpful, no less essential, to ensuring that the education provided to students on base is comparable to education off base. "Comparability" of education is intangible. It cannot be measured simply by comparing teachers' salaries or even per-pupil teacher expenditures. There is no proof that modest salary increases will do anything but improve education at Fort Stewart by improving morale and the retention rate of experienced teachers. Congress enacted Section 6 out of concern for the welfare of military dependents, not local school districts.[11] While the Army must provide an edu-

[11] The Section 6 schools were originally created because the public schools in neighboring communities were racially segregated. *Hearings pursuant to H. Res. 115 before the Special Subcomm. of the House Comm. on Education and Labor*, 83rd Cong., 1st Sess., 127-130 (1953) (statement of Rall Grigsby, Acting Commissioner of Education). Authority to operate schools on military bases

cation that is comparable, nothing prohibits it from providing a better education than the local school districts do. Any other reading of § 241 would be absurd because no purpose would be served by it. Would the Army be in violation of § 241 if the students at Fort Stewart got higher standardized test scores, got into better colleges, read better, wrote better and spelled better than students in local public schools?

Nor has the Army demonstrated how its regulation is essential to carrying out § 241(e). That subsection only requires equal per-pupil costs "to the maximum extent practicable." Assuming that it is not practicable to offset the increased cost of teachers' salaries by other economies in the schools' overall program (and certainly economies can be found in any government program), the Army may exceed per-pupil costs without offending § 241(e) because it is not "practicable" to equalize them *and* meet the bargaining obligations imposed upon the Army by the FSLMR Statute at the same time. Both Section 6 and the FSLMR Statute are acts of Congress advancing important social welfare goals, and both are equally important. The Army's obligations under one law must be balanced with its obligations under the other. Under the FSLMR Statute the Army *must* bargain over conditions of employment, but under § 241(e) the Army must equalize per-pupil expenditures only if it is "practicable" to do so.

Even assuming that the Army has no discretion to exceed equal per-pupil costs, the Army has not even disclosed how the per-pupil expenditures at Fort Stewart presently compares with such expenditures at Georgia public schools. Nor has the Army demonstrated that teach-

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within the United States was expanded by the Civil Rights Act of 1960, Pub. L. No. 86-449, Title V, § 501, 74 Stat. 909 (1960) because local school authorities near military bases had closed public schools in an attempt to defy desegregation orders. 1960 U.S. CODE CONG. & AD. NEWS 1946, 1950.

ers in local public schools are given a smaller annual salary increase than that sought herein.[12] Assuming that salaries at Fort Stewart and the Georgia public schools are presently comparable, other significant portions of the teachers' total compensation package are already unequal. Teachers at Fort Stewart who were employed prior to December 31, 1983, are covered by the Federal Civil Service Retirement System, 5 U.S.C. § 8301 *et seq.* The Army contributes 7% of each employee's basic pay to the Civil Service Retirement Fund and nothing to the Social Security Fund. Georgia school districts contribute 13.43% of each teacher's salary rate to the Teacher Retirement System of Georgia, GA. ANN. CODE § 47-3-1 *et seq.*, plus 7.51% to the Social Security Fund. Assuming salaries are currently equal, the Army must immediately raise the salary of teachers employed prior to 1984 13.94% to have the total compensation costs for those teachers equal the costs for similar teachers in Georgia public schools. Fort Stewart teachers are covered by different health insurance programs (compare 5 U.S.C. § 9801 *et seq.* with GA. CODE ANN. § 20-2-880 *et seq.*) as well as different life insurance and disability programs. The claim that compensation costs are and must remain equal is a myth.

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[12] The proposal for an annual 13.5% raise is not the only one at issue. Other proposals would require the Army to use certain specified procedures in surveying the salaries paid to teachers in local school districts, would require that the number of pay steps corresponding to the number of years of experience be increased from 16 to 20, and concern other fringe benefits. The Army has not explained how these proposals conflict with pay practices in local school districts.

CONCLUSION

The petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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August, 1989

APPENDIX

APPENDIX

INVENTORY OF FEDERAL PAY SYSTEMS

STATUTORY PAY SCHEDULES

General Schedule (Title 5, United States Code, chapter 51 and subchapter III of chapter 53)		[1] 1,412,169
Foreign Service (Title 22, USC, chapters 14 and 14A)		13,950
Career Ambassadors, Career Ministers, and Chiefs of Missions	123	
Foreign Service Officers	3,278	
Foreign Service Reserve	5,816	
Foreign Service Staff	3,806	
Foreign Service Information Officers	927	
Department of Medicine and Surgery, Veterans Administration (Title 38, USC, chapter 73)		26,658
Physicians and Dentists	4,920	
Nurses	21,738	
Administrative Personnel	[2]	
Executive Schedule (5 USC, subchapter II of chapter 53)		[3] 378
Commissioned Personnel, Public Health Service and National Oceanic and Atmospheric Administration (Title 37, USC)		5,485
Executive Protective Service (3 USC 204)		[4] 850
United States Park Police (Title 4, District of Columbia Code, 833)		514
Police, National Zoological Park (5 USC 5365)		[5] 30

ADMINISTRATIVE DETERMINED SALARY SCHEDULES

United States Postal Service (Title 39, USC)		718,502
Postal Service	577,589	
Rural Carriers	58,038	

See footnote at end of table.

Postal Management	47,846	
Postal Executive	29,502	
Fourth-Class Postmasters	5,332	
Postal Service Temporary Rate	107	
Postal Service Officer	88	
Similar to the General Schedule		
Energy Research and Development Administration (Atomic Energy Act of 1954, Sec. 161d; and Energy Reorganization Act of 1974)		[4]7,105
Nuclear Regulatory Commission (Atomic Energy Act of 1954, Sec. 161d; and Energy Reorganization Act of 1974)		[4]1,016
National Security Agency (Pub. L. 86-36, Sec. 2)		[2]
Central Intelligence Agency (50 USC 403g)		[2]
Panama Canal Zone (Title 2, Canal Zone Code, 143 and 144)		2,893
Federal Deposit Insurance Corp. (12 USC 1819)		[6]2,292
Federal Reserve System (Federal Reserve Act of 1913, as amended)		[6]1,046
National Science Foundation (42 USC 1873(a))		[6]292
Youth Employment Programs (Schedule A, Sec. 213.3102(v) and (w))		20, 789
Tennessee Valley Authority, Salary Policy Employees (Tennessee Valley Authority, Act of 1933, as amended)		[6]9,523
Clerical	2,255	
Engineering and Scientific	2,281	
Aide and Technician	2,070	
Management	1,871	
Administrative	519	
Custodial	286	
Public Safety	241	

See footnote at end of table.

Noncitizens in nonwage positions (Various authorities, including treaties and other agreements)		[6]19,335
Census temporary positions (13 USC 23 and 24)		[2]
Experts and Consultants (5 USC 3109)		10,889
Teachers, Department of Defense		[5]9,107
Overseas dependents schools (20 USC ch. 25)	7,357	
Domestic dependents schools (20 USC 241(a))	1,750	
United States Attorneys and Assistant U.S. Attorneys (28 USC 548)		[2]1,550
Special Attorneys, Department of Justice (28 USC 515)		[2]
Scientific and Professional (5 USC 3104 and similar authorities)		618
Faculty at Service Academies		[4]701
Naval Academy, Naval War College and Naval Postgraduate School (10 USC 7478, 7044, 7043, 6952)	570	
Merchant Marine Academy (46 USC ch. 31)	90	
Coast Guard Academy (14 USC 186(b))	41	
Civilian members of faculty and staff, Uniformed Services University of the Health Sciences, Department of Defense (10 USC 2213(f))		[2]
Canteen Service, Veterans Administration (38 USC 4202)		2,174
Foreign Compensation (Pub. L. 87-195, Sec. 625(d))		173
Foreign Defense (Pub. L. 87-195, Sec. 625(d))		15
Panama Canal Zone Special Category (2 Canal Zone Code 143 and 144)		1,317
Agricultural Marketing (7 USC 1627)		845

See footnote at end of table.

Alaska Railroad (43 USC 975)	[5] 120
National Bank Examiners, Department of Treasury (12 USC, ch. 1, and 5 USC 5102 (c)(14))	[2]
Board of Patent Appeals (35 USC 3 and 7)	[2]
Foreign Service Institute (22 USC 1044)	[2]
United Nations Participation (State Dept.) (Pub. L. 79-264)	[2]
Student Medical Interns (5 USC 5352 and 38 USC 4114)	[2]
Administrative Schedule, Agency for International Development (Pub. L. 87-195, Sec. 625(b))	[2]
Consular Agents (22 USC 861(6), 873, and 890)	[2]
Staff, Offices of Former Presidents (Pub. L. 85-745)	[2]
Smithsonian Institution (20 USC 74(c))	[2]

III. ADMINISTRATIVELY DETERMINED WAGE SCHEDULES

Federal Wage System (5 USC, subchapter IV of chapter 53)		470,558
Regular Schedule	438,886	
Nonsupervisory	(383,036)	
Leader	(14,371)	
Supervisory	(41,479)	
Production Facilitating	7,554	
Printing and Lithographic	4,887	
Other Special Schedules	25,210	
Tennessee Valley Authority, trades and labor employees (Tennessee Valley Authority Act of 1933, as amended)		14,842
Panama Canal Zone, wage employees (2 Canal Zone Code 143 and 144)		1,101
Vessel Employees (5 USC 5348)		4,878
Bonneville Power Administration (Bonneville Project Act, as amended)		[5] 1,100

See footnote at end of table.

Alaska Railroad, Operating Personnel (43 USC 975)	[5] 905
Bureau of Engraving and Printing (5 USC 5349)	622
Lighthouse Keepers (14 USC 432(f) and (g))	[2]
Noncitizen wage employees	[2]

[1] Extract of the Civil Service Commission's Central Personnel Data file as of April 30, 1975, unless otherwise specified.

[2] Data not available.

[3] This inventory lists numbers of positions actually occupied and reported. The Executive Schedule covers nearly 700 specific statutory positions, not all of which are occupied, or reported as occupied, at any one time.

[4] President's Budget for fiscal year 1976.

[5] Estimates for fiscal year 1976.

[6] Extract of Civil Service Commission's annual survey, "Salary and Wage Distribution of Federal Civilian Employees," as of March 31, 1974.

No. 89-65

In the Supreme Court of the United States

OCTOBER TERM, 1989

FORT STEWART SCHOOLS, PETITIONER

v.

FEDERAL LABOR RELATIONS AUTHORITY
AND FORT STEWART ASSOCIATION OF EDUCATORS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE FEDERAL LABOR RELATIONS AUTHORITY

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In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-65

FORT STEWART SCHOOLS, PETITIONER

v.

FEDERAL LABOR RELATIONS AUTHORITY
AND FORT STEWART ASSOCIATION OF EDUCATORS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE FEDERAL LABOR RELATIONS AUTHORITY

INTRODUCTION

On July 14, 1989, Fort Stewart Schools ("Army" or "Schools") petitioned for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit. The opinion of the court of appeals is reported at 860 F.2d 396, and is appended to the petition (Pet. App. 1a-30a).

It is the position of the respondent Federal Labor Relations Authority (Authority) that the unanimous Eleventh Circuit decision is correct and should be affirmed. However, a division among the circuits exists over the resolution of a major issue in this case, causing uncer-

tainty for all participants in federal government labor-management relations. Moreover, resolution of these issues are of considerable importance because they involve the negotiability of pay and money-related fringe benefits for a particular group of federal employees. Further, resolution of this case will impact on a range of issues important to federal sector labor relations, such as what constitutes negotiable conditions of employment under Title VII of the Civil Service Reform Act of 1978; and the extent of the right of federal agency management under that Act to determine its budget. Accordingly, the Authority does not oppose granting the present petition.

STATEMENT

A. Background

1. The Federal Service Labor-Management Relations Statute

Labor-management relations in the federal service are governed by the Federal Service Labor-Management Relations Statute (Statute), as amended, 5 U.S.C. 7101-7135. Under the Statute, the responsibilities of the Federal Labor Relations Authority (the Authority), a three-member independent and bipartisan body within the Executive Branch, include, among other things, adjudicating collective bargaining disputes and providing leadership in establishing policies and guidance relating to matters arising under the Statute. 5 U.S.C. 7104-7105. The Authority performs a role analogous to that of the National Labor Relations Board (NLRB) in the private sector. *Bureau of Alcohol, Tobacco and Firearms* v. *FLRA*, 464 U.S. 89, 92-93 (1983); *Federal/Postal/Retiree Coalition* v. *Devine*, 751 F.2d 1424, 1430 (D.C. Cir. 1985). Congress intended the Authority, like the NLRB, "to develop specialized expertise in its field of labor relations and to use that expertise to give content to the principles and goals set forth in

the [Statute]." *Bureau of Alcohol, Tobacco and Firearms* v. *FLRA*, 464 U.S. at 97.

Under the Statute, a federal agency must bargain in good faith with the exclusive bargaining representatives about unit employees' "conditions of employment." 5 U.S.C. 7103(a)(12). See also *Equal Employment Opportunity Commission* v. *FLRA*, 744 F.2d 842, 850 n.18 (D.C. Cir. 1984), cert. dismissed, 476 U.S. 19 (1986) ("conditions of employment" under Section 7103(a)(14) of the Statute to be construed broadly, to include the working situation and employment relations of bargaining unit employees). The term "conditions of employment" is defined as "personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions * * *" except to the extent, among other things, that a matter is "specifically provided for by Federal statute." 5 U.S.C. 7103(a)(14). However, there is no duty to bargain over contract language which would bring about an inconsistency with a federal law, government-wide rule or regulation, or an agency regulation for which a "compelling need" exists. 5 U.S.C. 7117(a); *FLRA* v. *Aberdeen Proving Ground, Department of the Army*, 108 S. Ct. 1261, 1262 (1988).

The Statute also contains a management rights clause that removes the exercise of certain management authority from the scope of negotiations. 5 U.S.C. 7106. As here pertinent, the Statute reserves as nonnegotiable, subject to subsection (b) of Section 7106, the authority of management "to determine the * * * budget." 5 U.S.C. 7106(a)(1). Subsection (b) of Section 7106 provides in relevant part that nothing in Section 7106 shall preclude an agency and an exclusive representative from negotiating procedures which management officials of the agency will observe in, and appropriate arrangements for employees adversely af-

fected by, the exercise of any authority by management officials under Section 7106. 5 U.S.C. 7106(b)(2) and (3).

Additionally, although strikes in the federal sector are forbidden under 5 U.S.C. 7116(b)(7), Congress established a Federal Service Impasses Panel ("FSIP" or "Panel"). The Panel is made up of at least seven presidential appointees, and is charged with the responsibility of settling bargaining impasses. Either party may request the Panel to conduct an inquiry into a bargaining impasse. If, after the Panel makes initial recommendations to the parties they still cannot reach a settlement, "the Panel may—(i) hold hearings; (ii) administer oaths, take the testimony or deposition of any person under oath, and issue subpenas * * *; and (iii) take whatever action is necessary and not inconsistent with this chapter to resolve the impasse." 5 U.S.C. 7119(c)(5)(B). See generally 5 C.F.R. 2471.1 to 2471.12. When the Panel imposes a term on the parties it is "binding on such parties during the term of the agreement, unless the parties agree otherwise." 5 U.S.C. 7119(c)(5)(C). The Panel does not have authority to pass judgments on assertions of nonnegotiability. The resolution of negotiability issues are made by the Authority.

In the instant case, the Authority adjudicated a dispute over whether collective bargaining proposals were within the duty to bargain established by the Statute. 5 U.S.C. 7105(a)(2)(E), 7117(c). Under the Statute, if a federal agency alleges that a bargaining proposal is outside the duty to bargain, the exclusve representative may appeal the agency's allegation of nonnegotiability to the Authority. 5 U.S.C. 7117(c). The Authority examines the disputed proposal based on the record presented to it by the parties. *NFFE, Local 1167* v. *FLRA*, 681 F.2d 886, 891 (D.C. Cir. 1982). If the Authority finds the proposal within the duty to bargain, the Authority orders that the agency upon request, or as otherwise agreed to by the parties, bargain

over the proposal. 5 C.F.R. 2424.10. The bargaining obligation imposed by the Statute does not require the agency to agree to the proposal or to make a concession. 5 U.S.C. 7103(a)(12); *Department of Defense* v. *FLRA*, 659 F.2d 1140, 1147 (D.C. Cir. 1981), cert. denied, 455 U.S. 945 (1982).

2. 20 U.S.C. 241

20 U.S.C. 241 authorizes the operation by federal agencies of schools in the United States which provide a free public education for eligible dependents children of military and civilian personnel who reside on federal property. For most federal employees Congress set specific wage and salary scales and classifications. However, Congress has not established specific wage and salary scales for dependents school employees. Title 20 U.S.C. 241(a) provides that "personnel may be employed and the compensation, tenure, leave, hours of work and other incidents of the employment relationship *may be fixed without regard to the Civil Service Act and rules* * * *" and specified portions of Title 5. 20 U.S.C. 241(a) (emphasis added).

Title 20 U.S.C. 241(a) also requires the dependents schools to ensure that education at its schools is "comparable to free public education provided for children in comparable communities in the State." 20 U.S.C. 241(a). In providing comparable education, dependents schools must comply with 20 U.S.C. 241(e), which provides that "to the maximum extent practicable" the Secretary shall limit total payments made for such education to an amount per pupil that does not exceed the amount spent in comparable communities in the state. 20 U.S.C. 241(e).

B. Proceedings in the Present Case

1. The Authority's Decision

This case arose during the course of collective bargaining negotiations between the Fort Stewart (Georgia) Association of Educators ("FSAE" or "union") and the Schools (Pet. App. 2a). Fort Stewart Schools is one of the dependents schools established under 20 U.S.C. 241 (Pet. App. 2a). The union represents all professional and nonprofessional employees at the Fort Stewart Schools—specifically, teachers, and other school employees (Pet. App. 2a).

During negotiations, the Schools objected to three bargaining proposals concerning salary and benefits presented by the union for bargaining (Pet. App. 2a).[1] The first proposal included sections which set mileage reimbursement, mandated certain insurance programs, and gave the union the right to review and comment on salary schedules (Pet. App. 31a-34a). The second proposal suggested a fixed salary increase of 13.5 percent for the teachers and other employees for the subsequent school year (Pet. App. 34a). The third proposal detailed various leave practices such as personal leave, sick leave, professional leave, maternity leave, and leave without pay (Pet. App. 48a-54a). The Authority concluded that most of proposal 1; all of proposal 2; and most of proposal 3 were within the agency's duty to bargain (Pet. App. 45a).

a. First, the Authority (Chairman Calhoun dissenting in part) determined that the agency had not supported its argument that the union's proposals do not concern conditions of employment (Pet. App. 35a). The Authority stated (Pet. App. 35a) that it had consistently held that

[1] The text of union proposals 1, 2, and 3 is appended to the petition (Pet. App. 31a-34a, 48a-54a) filed by the Army in this case.

nothing in the Statute or its legislative history prevents bargaining over employee compensation insofar as (1) the matters proposed are not specifically provided for by law and are within the discretion of the agency; and (2) the proposals involved are not otherwise inconsistent with law, applicable government-wide rule or regulation, or any agency regulation for which a compelling need exists. The Authority cited (Pet. App. 35a) in support its decision *American Federation of Government Employees, AFL-CIO, Local 1897 and Department of the Air Force, Eglin Air Force Base, Florida*, 24 F.L.R.A. 377 (1986) (*Eglin*) (Chairman Calhoun dissenting).[2]

[2] In *Eglin*, the Authority's lead decision in this area, the Authority found negotiable a proposal that a Nonappropriated Fund Instrumentality (NAFI) absorb 75% of the cost of health insurance. Health insurance for NAFI employees is not governed by law. After surveying the general scheme for setting pay and fringe benefits for federal employees, the scope of bargaining under the Statute, and rulings by the Federal Labor Relations Council under E.O. 11491, as amended, 3 C.F.R. 861 (1966-1970 Comp.), the Authority concluded that Congress intended wages and fringe benefits to be considered the same for negotiability purposes as other conditions of employment under the Statute (24 F.L.R.A. at 378-81). The Authority held in *Eglin* that various statements by legislators in the legislative history of the Statute, to the effect that pay matters would be nonnegotiable, reflected Congress' intent to bar pay negotiations only insofar as pay was specifically provided for by law (24 F.L.R.A. at 382-83). The Authority noted in this connection (24 F.L.R.A. at 379) the absence of any language in the Statute barring negotiations on pay; and the exclusion from the Statute's definition of "conditions of employment" of "matters • • • specifically provided for by Federal statute." 5 U.S.C. 7103(a)(14)(C). Thus, bargaining proposals concerning matters, including wages and money-related fringe benefits, which are not specifically provided for by federal law are negotiable to the extent they are not inconsistent with applicable laws and regulations (24 F.L.R.A. at 383).

Turning to the particular proposal at issue in *Eglin*, the Authority found that proration of health insurance costs for NAFI employees is

The Authority indicated that the employees covered by the proposals are employed under the provisions of 20 U.S.C. 241 (Pet. App. 36a). The Authority stated that it had previously held that nothing in 20 U.S.C. 241 or its legislative history indicated that Congress intended to restrict an agency's discretion concerning the particular employment practices relating to compensation which would be adopted (Pet. App. 36a). The Authority cited (Pet. App. 36a) in support its decision *Fort Knox Teachers Association and Fort Knox Dependent Schools*, 26 F.L.R.A. 934 (1987) (*Fort Knox Dependent Schools*) (Chairman Calhoun dissenting), petition for review filed sub nom. *Fort Knox Dependent Schools* v. *FLRA*, Nos. 87-3593/87-3742 (6th Cir. June 25, 1987).

In *Fort Knox Dependent Schools*, 26 F.L.R.A. at 935-38, the Authority found a proposal concerning sabbatical leave, similar to a portion of proposal 3 here at issue, neither conflicted with the express terms of 20 U.S.C. 241 nor the intent of Congress underlying that provision. The Authority in *Fort Knox Dependent Schools*, 26 F.L.R.A. at 937, rejected arguments that a proposal would conflict with the cost limitation provisions of 20 U.S.C. 241(e) simply by causing increased costs in a particular area of personnel compensation such as leave. Such an increase, the Authority held in *Fort Knox Dependent Schools*, 26 F.L.R.A. at 937, would not necessarily cause the agency to exceed the limitations on total per pupil cost of providing an education, noting that compensation is only one aspect of total cost.

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not a matter of specifically provided for by law, and is therefore a "condition[] of employment" under Section 7103(a)(14)(C) of the Statute (24 F.L.R.A. at 384). Further, the Authority rejected the agency's claim that the union's proposal was inconsistent with management's right to determine its budget, and with an agency regulation allegedly supported by a compelling need (24 F.L.R.A. at 386-88).

b. Second, the Authority rejected the Army's claim that the proposals interfered with the Army's right to determine its budget under Section 7106(a)(1) of the Statute (Pet. App. 36a-37a). The Authority stated its long standing principle that in order to demonstrate that a union proposal directly interferes with management's right to determine its budget under Section 7106(a)(1), it is necessary for the agency either to show that the proposal prescribes the programs and operations to be included in the agency's budget or the amount to be allocated for them; or to make a substantial demonstration that the anticipated increase in costs is significant and unavoidable and is not offset by compensating benefits (Pet. App. 36a).

The Authority stated that the Army had not made a substantial demonstration that implementation of the proposals would result in a significant, unavoidable increase in costs not offset by compensating benefits (Pet. App. 37a). The Authority indicated that the record failed to show how many employees would actually be affected by the proposals, or the monetary increase which would be directly attributable to implementation of the proposals in the subject bargaining unit or in other bargaining units within the system (Pet. App. 37a).

The Authority also determined that the Army had failed to show that any increased costs occasioned by the proposals would not be offset by compensating benefits (Pet. App. 37a). The Authority rejected the Army's contention that Congress' exempting teachers from the statutes governing pay and certain benefits for government employees constitutes a finding that increases in teachers' pay are not offset by compensating benefits (Pet. App. 37a-38a). The Authority found the congressional action could not be construed to cover the alleged cost increase which would result from implementing the proposals involved in this

case within the bargaining unit (Pet. App. 38a). Finally, the Authority noted that while the consequences of a proposal may be considered in the collective bargaining process, if concerns such as agency cost prevented the parties from reaching agreement, that consideration could be presented to the Federal Service Impasses Panel pursuant to Section 7119 of the Statute (Pet. App. 38a).

c. Finally, the Authority turned to the Army's assertion that the proposals conflict with the Army's regulation, designated AR 352-3, for which the Army alleged a "compelling need" exists within the meaning of 5 U.S.C. 7117(a)(2) and (b) (Pet. App. 40a-41a). The Authority pointed out (Pet. App. 40a-41a) that substantially the same argument was raised by the agency to support its claim that there was a compelling need for AR 352-3 to bar negotiations of proposal 4 in *Fort Knox Teachers Association and Board of Education of the Fort Knox Dependents Schools*, 27 F.L.R.A 203 (1987), petition for review filed sub nom. *Board of Education of the Fort Knox Dependents Schools* v. *FLRA*, Nos. 87-3702/87-3853 (6th Cir. July 24, 1987) (*Fort Knox Teachers Association*). In that case the Authority found "nothing in either the law or its legislative history which persuades [the Authority] that Congress intended to restrict the Agency's discretion as to the particular employment practices which could be adopted" (Pet. App. 41a). *Fort Knox Teachers Association*, 27 F.L.R.A. at 216. Consequently, the Authority indicated here as it had held in *Fort Knox Teachers Association*, that the agency failed to sustain its burden of showing a compelling need for the regulation (Pet. App. 41a). Moreover the Authority stated in the instant case even assuming the Army had supported its compelling need argument, the agency had not shown how several portions of proposal 1, which assume that pay rates will be fixed in

accordance with pay practices in comparable school systems, conflicted with the Army's regulation (Pet. App. 41a).

2. The Court of Appeals' Decision

Fort Stewart Schools petitioned the Eleventh Circuit to review the Authority's decision (Pet. App. 1a). On November 21, 1988, a unanimous panel of the Eleventh Circuit affirmed and enforced the Authority's decision and order (Pet. App. 1a-30a). The court of appeals held that the Army was required to bargain over the union's proposals involving salaries and fringe benefits of School employees (Pet. App. 6a-21a). In reaching this conclusion the court of appeals made three basic holdings (Pet. App. 6a-21a).

a. First, the court of appeals determined that the Army had a statutory duty to bargain because the union's proposals involve "conditions of employment" within the Army's discretion (Pet. App. 6a-17a). The court of appeals indicated that the Authority had determined in prior decisions that the Statute did not prohibit bargaining over compensation and fringe benefits when: "Congress has not specifically provided for these matters; and the proposals do not conflict with law, government-wide rule or regulation, or an agency regulation for which a compelling need exists" (Pet. App. 7a; citation omitted). The court of appeals determined that the Statute and its legislative history supported the Authority's conclusion (Pet. App. 7a). The court of appeals explained that the Statute's definition of "conditions of employment" does not exclude compensation and fringe benefits (Pet. App. 7a).

The court rejected the Army's argument that the definition of "conditions of employment" in the Statute encompasses a narrower range of bargainable matters than under

Section 8(d) of the National Labor Relations Act (NLRA), 29 U.S.C. 158(d),[3] because the Statute does not specifically list wages and hours as bargainable matters (Pet. App. 8a). The court found that the absence of such terms did not prove Congress intended to exclude "wages" and "hours" from negotiation (Pet. App. 8a). Rather, the court explained that Congress' use of the word "other" in Section 8(d) shows that Congress considered wages and hours to be conditions of employment (Pet. App. 8a). In the Statute, the court stated Congress simply used the general term "conditions of employment" which encompasses wages, to define the scope of negotiable matters (Pet. App. 8a).

The court also rejected the Army's argument that Section 704 of the Civil Service Reform Act of 1978, 5 U.S.C. 5343 note, indicates congressional intent against bargaining on wages for federal employees not covered by a provision like Section 704 (Pet. App. 8a). That section authorizes certain groups of federal prevailing rate employees to negotiate on, among other things, pay matters. The court found that the legislative history of Section 704 indicates that the section was intended to continue an exclusion of certain employees from the Prevailing Rate Systems Act of 1972, Pub. L. No. 92-392, 86 Stat. 564 (codified at 5 U.S.C. 5341-5349), which Act would have specifically provided for the employees' pay but for the exclusion (Pet. App. 8a-9a).

Turning to the legislative history of the Statute, the court agreed with the Authority and the Second Circuit in *West Point Elementary School Teachers Assoc.* v. *FLRA*, 855 F.2d 936, 939-40 (2d Cir. 1988) (*West Point*), that

[3] Section 8(d) of NLRA states in relevant part that "wages, hours, and other terms and conditions of employment" are subject to bargaining in the private sector.

legislators' remarks during debate on the Statute concerning negotiation on wages reflected an intent to bar negotiation only insofar as wage matters were regulated by Congress in legislation (Pet. App. 9a-13a).

The court also agreed with the Authority and the Second Circuit that the proposals were not inconsistent with 20 U.S.C. 241 (Pet. App. 13a). The court determined that the language of Section 241 does not specifically provide for the wages of school employees; nor does that section require identical salaries between dependents schools and local schools (Pet. App. 13a-16a).

b. Next, the court concluded the Army had not established a compelling need for its regulation that mandates equality of compensation between employees in dependents schools (Pet. App. 17a-19a). The court agreed with the Authority and the Second Circuit that the Army regulation does not "implement a mandate to the Army since Section 241 does not require the Army to compensate its school employees according to local public school practices" (Pet. App. 18a). As the Second Circuit had concluded, 855 F.2d at 943, the court determined that the regulation was not "essential" to the Army providing a comparable education at comparable cost (Pet. App. 18a). The court found that the Army could achieve both of these goals notwithstanding large variations in the employees' wages because many expenses beyond their salaries enter into the per pupil expenditures (Pet. App. 18a-19a). Moreover, the court stated Section 241 requires equality only to the maximum extent possible, not exact equality (Pet. App. 19a).

c. Finally, the court agreed with the Authority's conclusion that the union's proposals did not interfere with the Army's right to determine its own budget (Pet. App. 19a-20a). Similar to the Second Circuit, 855 F.2d at 943-44, the court deferred to the Authority's decision that

the proposals do not invade the Army's right to make its budget (Pet. App. 20a). The court agreed with the Authority that the Army had not demonstrated that the proposals would cause substantial and unavoidable cost increases (Pet. App. 20a). The Army did not specify any amount by which the proposed matters would increase its budget (Pet. App. 20a). Further, the court found that the Army did not establish that no compensating benefits would offset such costs even if its costs increased (Pet. App. 20a). In sum, the court denied the Army's petition for review and granted the Authority's petition to enforce the Authority order (Pet. App. 21a).

d. Fort Stewart Schools filed with the court below a petition for rehearing with suggestion for rehearing en banc. On February 17, 1989, both the petition for rehearing and the suggestion for rehearing en banc were denied, with no judge voting in favor of it (Pet. App. 55a-56a).

THE AUTHORITY DOES NOT OPPOSE THE PETITION

The Authority believes that the decision of the court below is correct. The Authority recognizes, however, that the several courts of appeals that have considered the issue of the negotiability of pay and money related fringe benefits for certain groups of federal employees have reached varying results.

There is a direct conflict in the courts of appeals on the question of whether compensation is a "condition[] of employment" under the Statute subject to collective bargaining in an agency whose pay schedules are not fixed by law. The Second Circuit[4] and the court below have held that pay/fringe benefit matters involving Department of Defense Dependents Schools (DODDS) domestic teachers

[4] *West Point Elementary School Teachers Assoc.* v. *FLRA*, 855 F.2d 936, 939-40 (2d Cir. 1988).

covered by 20 U.S.C. 241 may be bargained on to the extent consistent with law and applicable regulation. On the other hand, the Sixth Circuit recently reversed an Authority decision and order involving the same type of employees, finding that pay matters are not within the scope of the bargaining obligation under the Statute. *Fort Knox Dependent Schools* v. *FLRA*, 875 F.2d 1179 (6th Cir. 1989) (*Fort Knox*). The D.C. Circuit, in cases involving teachers at overseas dependents schools, which are governed by a different statute (20 U.S.C. 902) from that governing domestic dependents schools, noted in finding that pay matters are not negotiable "conditions of employment" that it was fully aware of contrary decisions on this issue by the Second Circuit and the court below. *Department of Defense Dependents Schools* v. *FLRA*, 863 F.2d 988, 991 n.3 (D.C. Cir. 1988) reh'g en banc granted (Feb. 6, 1989) (*DODDS Schools*).

In addition, the Third Circuit has ruled that for federal civilian mariners covered by 5 U.S.C. 5348, pay issues are not negotiable "conditions of employment" under the Statute. *Department of the Navy, Military Sealift Command* v. *FLRA*, 836 F.2d 1409 (3d Cir. 1988). Recently, the Fourth Circuit held en banc, in reversing a panel decision involving pay issues concerning Nuclear Regulatory Commission employees who are excepted from the general civil service laws, that pay issues are not negotiable under the Statute. *Nuclear Regulatory Commission* v. *FLRA*, No. 87-3182 (4th Cir. July 14, 1989 (*NRC*), petition for cert. filed sub nom. *National Treasury Employees Union* v. *United States Nuclear Regulatory Commission, et al.*, 58 U.S.L.W. 3114 (U.S. Aug. 3, 1989) (No. 89-198). This kind of circuit split means that different employees in different parts of the country have different rights to bargain through their exclusive representatives on pay

matters.[5] Although the total number of federal employees who are in a position to bargain on pay matters is relatively small compared to the overall federal civilian work force, the importance of this issue to those employees makes this kind of disparity a strong basis for granting the petition in this case.[6]

Moreover, if the Court concludes that compensation is a negotiable "condition[] of employment" under Section 7103(a)(14) of the Statute, it will need to resolve two other issues. Those issues concern whether the proposals conflict

[5] Various pay and fringe benefit cases are pending in courts of appeals as of the date of this memorandum. The Sixth Circuit has three domestic teacher pay/fringe benefit cases which have been stayed pending the resolution of *Fort Knox*. The Eleventh Circuit has two other cases stayed pending Supreme Court action in this case. *United States Army Aviation Center, Ft. Rucker, Georgia* v. *FLRA*, No. 87-7783 (11th Cir. proceedings stayed Apr. 5, 1989) (reviewing 29 F.L.R.A. 1447 (1987)); *United States Marine Corps Logistics Base, NAFI, Albany, Georgia* v. *FLRA*, No. 88-8006 (11th Cir. proceedings stayed Apr. 24, 1989) (reviewing 29 F.L.R.A. 1587 (1987)). The Ninth Circuit has a NAFI pay/fringe benefit case pending, *Department of the Army, United States Army Support Command, Fort Schafter, Hawaii* v. *FLRA*, No. 88-7004 (9th Cir. argued Jan. 10, 1989) (reviewing 29 F.L.R.A. 1553 (1987)). Finally, the D.C. Circuit has three pay/fringe benefit cases which have been stayed pending resolution of the petition for rehearing en banc in *DODDS Schools. FLRA* v. *FDIC*, No. 87-1716 (D.C. Cir. submitted on the briefs Jan. 6, 1989) (involving pay for FDIC employees); *FLRA* v. *FDIC*, No. 87-1717 (D.C. Cir. argued Jan. 6, 1989) (involving fringe benefits for FDIC employees); *Department of the Army, Fort Bragg Schools* v. *FLRA*, No. 88-1132 (D.C. Cir. argued Jan. 19, 1989) (involving pay/fringe benefits for domestic DODDS teachers).

[6] Although the Authority agrees with respondent FSAE to the extent it claims the percentage of the federal civilian workforce affected by this issue is relatively small (FSAE Br. Op. at 1-5), the Authority does not concur that the numbers of employees involved are so small as not to warrant review of the question in this Court.

with management's right to determine its budget under Section 7106(a)(1); and whether the Army has established a compelling need for its regulations which would bar bargaining on the proposals under Section 7117(a)(2).

At this point there does not appear to be a direct conflict among the circuits on the question of whether compensation-related proposals conflict with management's right to determine its budget under Section 7106(a)(1).[7] However, there is a direct conflict on the issue of whether there is a "compelling need" for the Army regulation providing that compensation rates at dependents schools equal those of the local schools. Like the Second Circuit in *West Point*, the court below has agreed with the Authority's analysis on this issue, while the Sixth Circuit held to the contrary, disagreeing with the court below and the Second Circuit.

[7] The absence of a majority of the participating judges joining in the resolution of the budget issue in *NRC* means that Fourth Circuit precedent remains open on this issue. See, *e.g.*, *Hertz* v. *Woodman*, 218 U.S. 205, 213-214 (1910) ("but the principles of law involved not having been agreed upon by a majority of the court sitting prevents the case from becoming an authority for the determination of other cases, either in this or in inferior courts"); *NLRB* v. *J-Wood/A Tappan Division*, 720 F.2d 309, 319 n.1 (3d Cir. 1983) (Gibbons, J., noting the absence of an opinion of the ten-member court on an issue where the vote was 5-4, with one judge concurring in the result but not the reasoning of the five-judge opinion in *NLRB* v. *ARA Services, Inc.*, 717 F.2d 57 (3d Cir. 1983) (en banc)); *Beron* v. *Kramer-Trenton Company*, 402 F. Supp. 1268, 1277 (E.D. Pa. 1975) ("only those holdings which muster majority approval may be accorded precedential value"); *People* v. *Jackson*, 212 N.W.2d 918, 921 (Mich. S. Ct. 1973) (in a decision with 7 judges participating, "[s]ince neither opinion obtained four signatures, neither is binding under the doctrine of *stare decisis*."

Accordingly, the Authority does not oppose granting the present petition.[1]

Respectfully submitted.

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SEPTEMBER 1989

[1] The Acting Solicitor General authorizes the filing of this memorandum by Respondent Federal Labor Relations Authority.

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OCTOBER TERM, 1989

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FEDERAL LABOR RELATIONS AUTHORITY and
FORT STEWART ASSOCIATION OF EDUCATORS

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the wages and money-related fringe benefits of federal employees whose rate of compensation is not entirely fixed by statute are negotiable "conditions of employment" under 5 U.S.C. 7103(a).

2. Whether compensation-related proposals—such as the Union's proposal in this case to raise the salaries of employees at two schools for dependents of Army personnel by 13.5%—are non-negotiable because they interfere with an agency's management right under 5 U.S.C. 7106(a) to set the agency's budget.

3. Whether the Union's proposals in this case are non-negotiable under 5 U.S.C. 7117 because they are "the subject of [an] agency rule or regulation" for which there is a "compelling need."

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*ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT*

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-30a) is reported at 860 F.2d 396. The decision of the Federal Labor Relations Authority (Pet. App. 31a-54a) is reported at 28 F.L.R.A. 547.

JURISDICTION

The judgment of the court of appeals (Pet. App. 19a-20a) was entered on November 21, 1988. A timely petition for rehearing was denied on February 17, 1989 (Pet. App. 55a-56a). On May 11, 1989, Justice Kennedy extended the time within which to

file a petition for a writ of certiorari to and including July 17, 1989. The petition for a writ of certiorari was filed on that date, and was granted on October 2, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

A. Title VII of the Civil Service Reform Act, also known as The Federal Service Labor-Management Relations Statute

Section 7102 (5 U.S.C.) provides in relevant part:

> Each employee shall have the right * * *
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> * * * * *
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> (2) to engage in collective bargaining with respect to conditions of employment through representatives chosen by employees under this chapter.

Section 7103 (5 U.S.C.) provides in relevant part:

> (a) For the purpose of this chapter—
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> * * * * *
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> (14) "conditions of employment" means personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions, except that such term does not include policies, practices, and matters
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> (C) to the extent that such matters are specifically provided for by Federal statute[.]

Section 7106(a)(1) (5 U.S.C.) provides:

> (a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency—

> (1) to determine the mission, budget, organization, number of employees, and internal security practices of the agency * * *.

Section 7117 (5 U.S.C.) provides in relevant part:

> (a)(1) Subject to paragraph (2) of this subsection, the duty to bargain in good faith shall, to the extent not inconsistent with any Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any rule or regulation only if the rule or regulation is not a Government-wide rule or regulation.
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> (2) The duty to bargain in good faith shall, to the extent not inconsistent with Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any agency rule or regulation referred to in paragraph (3) of this subsection only if the Authority has determined under subsection (b) of this section that no compelling need (as determined under regulations prescribed by the Authority) exists for the rule or regulation.

B. The dependents school statute and regulation

Section 241 (20 U.S.C.), originally enacted as Title I, Section 6 of ch. 1124, 64 Stat. 1107, provides in relevant part:

> (a) In the case of children who reside on Federal property—
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> * * * * *
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> the Secretary shall make such arrangements (other than arrangements with respect to the acquisition of land, the erection of facilities, interest, or debt service) as may be necessary to provide free public education for such children. * * * To the maximum extent practicable, the local

educational agency, or the head of the Federal department or agency, with which any arrangement is made under this section, shall take such action as may be necessary to ensure that the education provided pursuant to such arrangement is comparable to free public education provided for children in comparable communities in the State, or, in the case of education provided under this section outside the continental United States, Alaska, and Hawaii, comparable to free public education provided for children in the District of Columbia. For the purpose of providing such comparable education, personnel may be employed and the compensation, tenure, leave, hours of work, and other incidents of the employment relationship may be fixed without regard to the Civil Service Act and rules * * *.

* * * * *

(e) To the maximum extent practicable, the Secretary shall limit the total payments made pursuant to any such arrangement for educating children within the continental United States, Alaska, or Hawaii, to an amount per pupil which will not exceed the per pupil cost of free public education provided for children in comparable communities in the State. The Secretary shall limit the total payments made pursuant to any such arrangement for educating children outside the continental United States, Alaska, or Hawaii, to an amount per pupil which will not exceed the amount he determines to be necessary to provide education comparable to the free public education provided for children in the District of Columbia.

Army Reg. 352-3, 1-7 provides:

Comparison factors. Education provided pursuant to the provisions of Section 6 for children residing on Federal property will be considered comparable to free public education offered by selected communities of the State when the following factors are, to the maximum extent practicable, equal:

a. Qualifications of professional and nonprofessional personnel.
b. Pupil-teacher ratios.
c. Curriculum for grades offered, including kindergarten and summer school, if applicable.
d. Accreditation by State or other accrediting association.
e. Transportation services (student and support).
f. Length of regular and/or summer term(s).
g. Types and number of professional and nonprofessional positions.
h. Salary schedules.
i. Conditions of employment.
j. Instructional equipment and supplies.

STATEMENT

This case involves the negotiability of proposals to increase the compensation of federal employees. The employees in this case are teachers at schools for the dependents of personnel stationed at Fort Stewart, an Army base in Georgia.

A. The Statutory And Regulatory Framework

1. *The federal labor relations statute*

Title VII of the Civil Service Reform Act of 1978 (CSRA) (sometimes referred to as the Federal Service Labor-Management Relations Statute), 5 U.S.C. 7101-7135, establishes "the first statutory scheme governing labor relations between federal agencies and their employees." *Bureau of Alcohol, Tobacco*

and Firearms v. *FLRA*, 464 U.S. 89, 91 (1983). The statute grants to federal employees the right to bargain collectively over their "conditions of employment." 5 U.S.C. 7102(2). The phrase "conditions of employment" is defined to include "personnel policies, practices, and matters * * * affecting working conditions, * * * (C) to the extent such matters are [not] specifically provided for by Federal statute." 5 U.S.C. 7103(a)(14). Whether or not a matter is a "condition[] of employment," the statute generally provides that nothing in it shall "affect the authority of any management official of any agency" with respect to certain enumerated "management rights," including the right "to determine the * * * budget * * * of the agency." 5 U.S.C. 7106(a)(1). The statute also precludes an agency from bargaining over proposals that are "inconsistent with any Federal law or any Government-wide rule or regulation" (5 U.S.C. 7117(a)(1)) and over "matters which are the subject of any agency rule or regulation" for which there is a "compelling need" (5 U.S.C. 7117(a)(2)). See generally *FLRA* v. *Aberdeen Proving Ground*, 108 S. Ct. 1261, 1262 (1988).

It is undisputed that proposals relating to the compensation of federal employees are generally not negotiable under this scheme. The pay of most federal employees is set by the General Schedule (see 5 U.S.C. 5332), and their benefits are also governed by statute. Therefore, compensation is not a "condition[] of employment" under Section 7103(a)(14)(C) with respect to those employees, since it is "specifically provided for by Federal statute." In addition, it is clear that bargaining over the compensation of employees subject to the General Schedule would be

barred by Section 7117(a) as "inconsistent with * * * Federal law." [1] The largest group of federal employees governed by Title VII of the CSRA who are not paid according to the General Schedule are craft workers subject to the Prevailing Rate Act. See 5 U.S.C. 5341, 5342(a)(2); Union's Br. in Opp. 4a. It is undisputed that those craft workers may not bargain about compensation (see *id.* at 16) because the Prevailing Rate Act provides that they are to be paid according to the results of wage surveys conducted in accordance with procedures established by the Office of Personal Management. 5 U.S.C. 5343.[2]

Under Title VII of the CSRA, if management officials decline to negotiate over a union's bargaining proposal, the union may file a negotiability appeal with the Federal Labor Relations Authority (FLRA or Authority). See 5 U.S.C. 7105(2)(E), 7117(c). The FLRA then makes a determination—reviewable in the courts of appeals—as to whether the union's proposal is subject to the bargaining obligation (5 U.S.C. 7117(c)(6)). See *Bureau of Alcohol, Tobacco and Firearms*, 464 U.S. at 93. The FLRA's determination that a particular bargaining proposal is negotiable does not, in and of itself, require the adoption of that proposal. But if negotiation reaches an impasse, either party may refer the matter to the Federal Service Impasses Panel, and the Panel is

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[1] We would add, although the respondents do not agree with this third ground, that bargaining over the wages of any federal employees subject to Title VII of the CSRA conflicts with agency management's right to set the agency budget.

[2] Another large group of federal employees, postal workers, are not governed by Title VII of the CSRA. 5 U.S.C. 2105(e). Their governing statute expressly provides that wages are negotiable. 39 U.S.C. 1201 note.

empowered to "take whatever action is necessary and not inconsistent with [the statute] to resolve the impasse" (5 U.S.C. 7119(c)(5)(B) (iii)), including the imposition of the disputed contract term upon the parties. See, *e.g.*, *National Federation of Federal Employees* v. *FLRA*, 789 F.2d 944, 945 (D.C. Cir. 1986); *Indiana Air National Guard* v. *FLRA*, 712 F.2d 1187, 1189 n.1 (7th Cir. 1983). Thus, in contrast to private sector collective bargaining, a determination that a proposal is negotiable "subjects the agency to the possibility that the Federal Service Impasses Panel will resolve the dispute by imposing a binding proposal upon the agency." *Nuclear Regulatory Commission* v. *FLRA*, 879 F.2d 1225, 1227 (4th Cir. 1989) (en banc).

2. The domestic dependents schools statute and regulation

Section 6 of Title I of ch. 1124, 64 Stat. 1107, codified as amended at 20 U.S.C. 241(a), provides for a free public education for eligible children living on federal property in the United States. The statute governing these "Section 6 schools" or "dependents schools" provides that, "[t]o the maximum extent practicable," the Secretary of Education "shall take such action as may be necessary to ensure that the education provided * * * is comparable to free public education provided for children in comparable communities in the State."[3] 20 U.S.C. 241(a). The statute further provides that "personnel may be employed and [their] compensation * * * fixed without regard to the Civil Service Act" and other federal laws governing pay, leave, and benefits. 20 U.S.C. 241(a).[4] Again "[t]o the maximum extent practicable", 20 U.S.C. 241(e) imposes an obligation on federal agencies to limit "the total payments * * * for educating children [at dependents schools] * * * to an amount per pupil which will not exceed the per pupil cost of free public education provided for children in comparable communities in the State."

In order to implement the statutory obligations imposed on the operation of Section 6 schools, the Army has issued a regulation governing the education of dependents. Army Reg. 352-3, 1-7. That regulation states that the education provided by dependents schools "will be considered comparable to free public education offered by selected communities of the States" when ten factors, including "salary schedules," are, "to the maximum extent practicable, equal." *Id.* at 352-3, 1-7(h).

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[3] The Secretary of Education and his predecessors have delegated the day-to-day operation of the schools to the individual branch of the armed services with which the installation is affiliated. See S. Rep. No. 1137, 95th Cong., 2d Sess. 106-107 (1978).

[4] There are "forty-odd federal pay systems which are not entirely fixed by statute." *Department of Defense Dependents Schools* v. *FLRA*, 863 F.2d 988, 989 (D.C. Cir. 1988), reh'g en banc granted (Feb. 6, 1989). In addition to teachers at domestic dependents schools, included among the federal employees who are not subject to the General Schedule or the Prevailing Rate Act are teachers at overseas dependents schools, which are governed by a different statute (20 U.S.C. 901-907) from that governing domestic schools; civilian mariners employed by the Navy, whose pay, under 5 U.S.C. 5348, is set by comparison with mariners employed by private vessels; electricians employed by the Bureau of Engraving and Printing, who are governed by 5 U.S.C. 5349(a); and employees of the Nuclear Regulatory Commission, who are excepted from the General Schedule by 42 U.S.C. 2201(d).

B. Proceedings Below

In this case, the Fort Stewart Association of Educators (the Union), which is the collective bargaining representative for employees of the two elementary schools operated by Fort Stewart under the Section 6 program, submitted three proposals for negotiation. The first proposal, which consisted of 15 subparts, concerned, among other things, health insurance, life insurance, and mileage reimbursement. Pet. App. 31a-34a. The second proposal sought to increase the salary of all bargaining unit members by 13.5%. *Id.* at 34a. The third proposal, which also had numerous subparts, concerned various types of leave, including sick leave, annual leave, personal leave, professional leave, court leave, maternity/paternity/adoption leave, and leave without pay. *Id.* at 48a-54a.

1. ***The FLRA's decision***

In a two-to-one decision, the FLRA determined that the three proposals were, for the most part, negotiable.[5] The Authority first rejected the agency's argument that teachers' pay is not among the condi-

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[5] The FLRA held that Subparts L and M of Proposal 1, which proposed that the schools provide free health and life insurance, were not negotiable because they were inconsistent with federal law within the meaning of 5 U.S.C. 7117(a)(1). It reached that conclusion because federal statutes limit the amount the schools may contribute toward health insurance and specifically require union members to contribute toward life insurance. Pet. App. 41a. The Authority also held that Section F(1) of Proposal 3, which proposed that leave without pay "may be approved at the discretion of the immediate supervisor" (*id.* at 53a), infringed on management's reserved right to assign work. *Id.* at 44a; see 5 U.S.C. 7106(a)(2)(B). These holdings are not before this Court.

tions of employment made negotiable by Title VII of the CSRA. The FLRA adhered to its prior decision that bargaining over employee compensation is permissible so long as "(1) the matters proposed are not specifically provided for by law and are within the discretion of the agency; and (2) the proposals involved are not otherwise inconsistent with law, applicable Government-wide rule or regulation, or with an agency regulation supported by a compelling need." Pet. App. 35a. In this case, the Authority found that nothing in 20 U.S.C. 241 or its legislative history "indicates that Congress intended to restrict an agency's discretion concerning the particular employment practices relating to compensation which could be adopted." Pet. App. 36a.

The Authority also found that the proposals did not interfere with the agency's right to determine its budget, because the Army had not made a "substantial showing that the proposal requires the inclusion of a particular program or amount in its budget or that the proposal will result in significant and unavoidable increases in cost not affected by compensating benefits." Pet. App. 36a. After noting that the dependents school system is comprised of "seven additional bargaining units with 626 members whose salaries total $11.3 million," the Authority nevertheless concluded that the agency "has failed to establish that increased costs could be expected or even that increased costs would be unavoidable." *Id.* at 37a. The Authority also concluded that the agency had failed to demonstrate that "any increased costs * * * would not be offset by compensating benefits," although it did not identify any benefits that might offset the increased costs. *Id.* at 37a-38a.

Finally, the Authority found that the agency had failed to show a compelling need for Army Regulation 352-3, 1-7(h), which requires equality of salaries between the dependents schools and their comparable community counterparts. The Authority instead found that the statute governing dependents schools was not "intended to restrict the Agency's discretion as to the particular employment practices which could be adopted." Pet. App. 40a-41a (citation omitted).[6]

Chairman Calhoun dissented, restating his belief that "in the absence of a clear expression of congressional intent to make wages and money-related fringe benefits negotiable," such matters "are not within the duty to bargain." Pet. App. 46a.

2. ***The court of appeals' opinion***

The court of appeals upheld the Authority's decision. Pet. App. 1a-30a. The court stated that the definition of "conditions of employment as 'personnel practices and matters * * * affecting working conditions' * * * alone does not exclude compensation and fringe benefits." Pet. App. 7a. The court dismissed statements in the statute's legislative history that "baldly assert that wages are not negotiable" (*id.* at 12a) on the ground that they were made "with the understanding that the Congress generally regulates such matters" (*id.* at 10a). Paying deference to the FLRA's interpretation of the statute (*id.* at 7a), the court concluded that wages are conditions of employment under Section 7103(a)(14).

[6] The Authority also rejected the agency's arguments that the proposals violated a federal procurement statute, 10 U.S.C. 2304, and the Antideficiency Act, 31 U.S.C. 1341. Pet. App. 39a-40a. These objections were not pressed on appeal and are not before this Court.

The court also deferred to the FLRA's determination that the proposals did not interfere with the agency's right to set its budget. Pet. App. 19a-20a. The court first held that the proposals "would not necessarily increase the Army's costs." *Id.* at 20a. In any event, it concluded, "any increase in the employees' salaries would not significantly increase the Army's budget," since the Army's budget "includes bases, troops, weapons, vehicles, other equipment, salaries for all other officers, and expenses for its eight other schools." *Ibid.* The court also held that even if it were clear that the Army's costs would increase, the Army had failed to show that there would be "no compensating benefits." *Ibid.*

In addition, while acknowledging that the proposals conflicted with the Army's regulation mandating equality of salaries, the court held that the Army had not established a "compelling need" for that regulation. Pet. App. 18a-19a. The court found that 20 U.S.C. 241 does not itself "require" the Army to compensate its teachers according to local public school practices. Pet. App. 18a. Moreover, the court found that the regulation was not "essential" to the statutory mandate requiring a "comparable education at a comparable cost per pupil" (*ibid.*), since "many expenses beyond * * * salaries"—including "books, building maintenance, athletic programs, clubs, and lunch service"—"enter into the per pupil expenditures," and "[m]any factors other than teachers' compensation also affect the quality of education" (*id.* at 18a-19a).

SUMMARY OF ARGUMENT

1. Congress did not intend to authorize federal employees to bargain collectively over their compensation. It extended the obligation to bargain only to "conditions of employment" (5 U.S.C. 7102(2)), a phrase it defined to include "matters * * * affecting working conditions" (5 U.S.C. 7103(a)(14)), but said nothing about wages or other forms of compensation. The phrase "conditions of employment" suggests the physical aspects of the working environment, not compensation. Moreover, the distinction between wages and conditions of employment has long been established in other federal laws concerning labor relations. And in the two cases where Congress has authorized federal employees to bargain over compensation—involving postal workers (see 39 U.S.C. 1201 note) and certain craft employees (see 5 U.S.C. 5343 note)—it did so explicitly.

The statute's legislative history removes all doubts on the issue. As an initial matter, Congress specifically rejected proposals that would have made wages negotiable generally and in cases such as this. The participants in the legislative debates then repeatedly assured their colleagues that the statute does not permit bargaining on economic matters.

In addition, common sense suggests that Congress would not obliquely have authorized federal employees to bargain over compensation. Wages and fringe benefits lie at the core of collective bargaining in the private sector. One would therefore expect that any legislation granting the right to bargain over those subjects—and a further right to outside arbitration when bargaining leads to an impasse—would confer those rights in no uncertain terms.

2. The Union's proposal to increase teachers' salaries by 13.5% also conflicts with the right to determine the agency's budget, a right reserved to management by 5 U.S.C. 7106(a)(1). Since teachers' salaries are by far the largest item in any school's budget, the proposal would result in an unavoidable and significant increase in the cost of operating the Fort Stewart schools. The court of appeals' contrary conclusion, reached only by comparing the cost of the Union's proposals to the Army's budget as a whole—including expenditures for bases, weapons, and troops—threatens to eliminate the budget right altogether. The court also erred in demanding that the Army prove that an across-the-board salary increase would not result in "compensating benefits" which would offset the resulting increased costs. The statute grants to the agency, not the FLRA, the right to decide whether a given expenditure will result in sufficient benefits to make the expenditure worthwhile.

3. The proposals are also non-negotiable because they conflict with an Army regulation (Army Reg. 352-3, 1-7) for which there is a "compelling need" (5 U.S.C. 7117(a)(2)). The statutory provisions governing the Section 6 school program require the Army to "ensure" as far as possible that the education provided by the schools is "comparable" to that provided by local public schools (20 U.S.C. 241(a)), and at the same time limit the per-pupil cost of the Army schools to no more than the per-pupil cost of those local schools (20 U.S.C. 241(e)). The Army has properly implemented these statutory commands by requiring that the "salary schedules" of its schools be "equal" to those of the local public schools. Army Reg. 352-3, 1-7(h). The court of appeals' suggestion that substantial increases in salaries, benefits, and

paid leave could be made up by reducing expenditures for "books, building maintenance, athletic programs," and other matters (Pet. App. 18a-19a)—all the while leaving the quality of education unaffected and not running afoul of the per-pupil cost limitation—is unwarranted and unrealistic.

ARGUMENT

I. THE FEDERAL LABOR RELATIONS STATUTE DOES NOT AUTHORIZE FEDERAL EMPLOYEES TO BARGAIN COLLECTIVELY OVER THEIR WAGES AND MONETARY FRINGE BENEFITS

Although the Authority's interpretations of Title VII of the CSRA are generally entitled to deference, reviewing courts "cannot rubber-stamp * * * decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute." *Bureau of Alcohol, Tobacco & Firearms* v. *FLRA*, 464 U.S. 89, 97 (1983) (citations omitted); accord *FLRA* v. *Aberdeen Proving Ground*, 108 S. Ct. 1261, 1263 (1988). "The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 n.9 (1984). In this case, the language, structure, and legislative history of Title VII of the CSRA show that Congress did not intend to authorize federal employees to bargain over their compensation. Four courts of appeals have therefore held that the FLRA erred in concluding that wages are negotiable "conditions of employment." *Nuclear Regulatory Commission* v. *FLRA*, 879 F.2d 1225, 1231 (4th Cir. 1989) (en banc), petitions for cert. pending, Nos. 89-198, 89-562; *Fort Knox Dependent Schools* v. *FLRA*, 875 F.2d 1179, 1181 (6th Cir. 1989), petition for

cert. pending, No. 89-736; *Department of Defense Dependents Schools* v. *FLRA*, 863 F.2d 988, 994 (D.C. Cir. 1988), reh'g en banc granted (Feb. 6, 1989); *Department of the Navy, Military Sealift Command* v. *FLRA*, 836 F.2d 1409, 1419 (3d Cir. 1988).[7]

1. Title VII of the CSRA extends collective bargaining in the federal workplace only to "conditions of employment" (5 U.S.C. 7102(2)), which it defines as "personnel policies, practices, and matters * * * affecting working conditions" (5 U.S.C. 7103(a)(14)). Examined in isolation, this language is most naturally read to refer to the physical conditions under which an employee labors. As the District of Columbia Circuit has noted, "[t]he term 'working conditions' ordinarily calls to mind the day-to-day circumstances under which an employee performs his or her job." *Department of Defense Dependents Schools*, 863 F.2d at 990; see also *Fibreboard Paper Products Corp.* v. *NLRB*, 379 U.S. 203, 222 (1964) (Stewart, J., concurring) (the phrase "conditions of employment" is most naturally read to encompass "the various physical dimensions" of an employee's "working environment"). Wages are not a matter "affecting working conditions." Instead, the opposite is true: one's compensation may be adjusted to take account of differences in working conditions, not the other way around. *Department of Defense Dependents Schools*, 863 F.2d at 990.

A review of other federal labor statutes confirms that Congress does not regard "wages" as a "condition[] of employment." To the contrary, it has always specifically mentioned compensation when it in-

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[7] Only the Second Circuit has agreed with the court below on this issue. *West Point Elementary School Teachers Association* v. *FLRA*, 855 F.2d 936, 942 (1988).

tends to authorize wage bargaining. In the private sector, the National Labor Relations Act authorizes collective bargaining over "wages, hours, and other terms and conditions of employment." 29 U.S.C. 158(d).[8] As the Third Circuit noted in *Military Sealift Command*, "Congress's use of only 'conditions of employment' implies a narrower range of bargainable matters under the Labor-Management Statute than under the NLRA." 836 F.2d at 1416 n.14; accord *Fort Knox Dependent Schools*, 875 F.2d at 1181. In the Postal Reorganization Act, by contrast, Congress expressly granted postal workers the right to bargain over "wages, hours, *and* working conditions." 39 U.S.C. 1201 note (Labor Agreements) (emphasis added). It thus distinguished between "wages" and "working conditions."[9] Congress was well aware of

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[8] The court below reasoned that "[b]y using the word "other," Congress included wages and hours in the general category of "conditions of employment." Pet. App. 8a. But the phrase employed in 29 U.S.C. 158(d) is "wages, hours, and other *terms* and conditions of employment" (emphasis added). The symmetry of the phrase suggests that wages were thought to be a "term" and hours a "condition" of employment. *Department of Defense Dependents Schools*, 863 F.2d at 991.

Other sections of the NLRA employ sightly different terminology. See 29 U.S.C. 151 (preamble) (referring to "the friendly adjustment of industrial disputes arising out of differences as to wages, hours or other working conditions"); 29 U.S.C. 159 (mentioning "rates of pay, wages, hours of employment, or other conditions of employment"). Neither of these alternative formulations equates wages with conditions of employment, however, and both are consistent with the conclusion that Congress thinks of *hours*, but not wages, as a condition of employment.

[9] Other federal statutes make the same distinction. See Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-

these other statutory provisions when it enacted the CSRA. See, *e.g.*, H.R. Rep. No. 1403, 95th Cong., 2d Sess. 12 (1978) (recognizing NLRA); 124 Cong. Rec. 29,182 (1978) (remarks of Sen. Udall) (noting bargaining practice in Postal Service). Thus if Congress had intended to authorize bargaining over wages and wage-related benefits, it would have said so.

Congress also distinguished between wages and conditions of employment in Section 704 of the CSRA. That Section provides that those craft employees (see 5 U.S.C. 5342(a)(2)) who bargained over compensation prior to 1972 may continue to bargain over "terms and conditions of employment and other employment benefits," including "pay and pay practices." 92 Stat. 1218, *reprinted in* 5 U.S.C. 5343 note. "The normal rule of statutory construction assumes

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2(a)(1) (prohibiting discrimination "with respect to his compensation, terms, conditions, or privileges of employment"); Defense Department Overseas Teachers Pay and Personnel Program Act, 20 U.S.C. 902 (distinguishing between authority to promulgate regulations concerning "the payment of compensation" (20 U.S.C. 902(a)(4)) and regulations concerning "the conditions of employment" (20 U.S.C. 902(a)(6)) of overseas teachers); 25 U.S.C. 2011 (making the same distinction with regard to teachers at Indian schools).

There are a few statutes that do not clearly distinguish pay from conditions of employment. See The Senior Executive Service Act, 5 U.S.C. 3131(1) (providing for "a compensation system, including salaries, benefits, and incentives, and for other conditions of employment"); 18 U.S.C. 4082(c)(2)(iii) (providing for "the rates of pay and other conditions of employment" of federal prisoners on work-release). But even these relatively obscure statutes do not expressly define wages to be a condition of employment. In any event, they show that when Congress addresses the subject of federal compensation, it does so by using terms that admit of no uncertainty.

that identical words used in different parts of the same act are intended to have the same meaning." *Sorenson* v. *Secretary of Treasury*, 475 U.S. 851, 860 (1986) (citations omitted). Accordingly, there is no reason to conclude that Congress intended that "conditions of employment" would encompass wages in Title VII of the CSRA when, in providing in Section 704 of the same Act that certain employees could bargain over wages, it spoke of *terms* and conditions of employment, and specifically mentioned pay and pay practices.[10]

2. Any doubt as to Congress's intent to exclude compensation-related matters from the definition of conditions of employment is removed by the statute's legislative history. That history is "replete * * * with indications that Congress did not intend to subject pay of federal employees to bargaining." *Military Sealift Command*, 836 F.2d at 1417; accord *Nuclear Regulatory Commission*, 879 F.2d at 1228; *Fort Knox Dependent Schools*, 875 F.2d at 1181; *Department of Defense Dependents Schools*, 863 F.2d at 992.

In enacting Title VII of the CSRA, Congress twice rejected proposals to make pay negotiable. First, Congressman Ford introduced a bill that would have made pay generally negotiable for federal employees (see 124 Cong. Rec. 25,721 (1978) (discussing H.R. 9094)), but the bill was not passed. Later, in the

[10] The statute's explicit preservation of management's right to "determine the * * * budget * * * of the agency" (5 U.S.C. 7106(a)(1)) is also inconsistent with the conclusion that Congress intended to authorize collective bargaining over federal wages. It makes little sense to interpret a statute that goes out of its way to immunize budget-setting from the collective bargaining process in a manner that permits bargaining over one of the most significant components of any agency's budget. See pp. 27-31, *infra*.

House committee markup, Representative Heftel unsuccessfully introduced a more limited proposal that would have extended the obligation to negotiate to "pay practices" and "overtime practices" so far as "consonant with law and regulation." House Comm. on Post Office & Civil Service, Subcomm. on Postal Personnel & Modernization, 96th Cong., 1st Sess., *Legislative History of the Federal Service Labor-Management Relations Statute* 1087-1088 (1979) (proposing new § 7115(b)). This unsuccessful attempt to extend the bargaining obligation to wages is particularly significant because "[f]ew principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language." *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 442-443 (1987) (citations omitted).

In addition, there are numerous statements in the committee reports that the statute was not meant to authorize wage bargaining. The Senate Report states, without exception, that Title VII of the CSRA "excludes bargaining on economic matters." S. Rep. No. 969, 95th Cong., 2d Sess. 13 (1978). The House Report similarly provides that the statute "does not permit * * * bargaining on wages and fringe benefits." H.R. Rep. No. 1403, 95th Cong., 2d Sess. 12 (1978). A supplemental statement to the House report, signed by various members of the governing Committee, emphasized that "[a]mong the collective bargaining rights not included in the bill are: * * * (2) The right to bargain collectively over pay and money-related fringe benefits such as retirement benefits and life and health insurance." *Id.* at 377. In the same vein, the supplemental views of Rep. Solarz noted that the statute "provide[s] that such matters as pay

and fringe benefits be excluded from collective bargaining." *Id.* at 390.

Statements in the floor debate—by the major figures in the bill's passage—are to the same effect. Representative Udall, who authored the compromise that was eventually enacted and whose views must therefore be accorded significant weight (*Simpson* v. *United States*, 435 U.S. 6, 13 (1978)), stressed that the bill would "not permit bargaining over pay and fringe benefits" (124 Cong. Rec. 25,716 (1978)). He later reiterated the point: "There is not really any argument in this bill or in this title about Federal collective bargaining for wages and fringe benefits and retirement—the kinds of things that are giving us difficulty in the Postal Service today." *Id.* at 29,182. Similarly, Representative Clay, a proponent of broad collective bargaining in the public sector, stated unequivocally that federal "employees still * * * cannot bargain over pay." *Id.* at 24,286. He reemphasized the point later on in the debate, stating: "I also want to assure my colleagues that there is nothing in this bill which allows Federal employees the right to * * * negotiate over pay and money-related fringe benefits." *Id.* at 25,720. In addition, Representative Ford, who had proposed the bill that would have allowed all federal employees to bargain about pay, noted that "no matters that are governed by statute (such as pay, money-related fringe benefits, retirement, and so forth) could be altered by a negotiated agreement" under the bill Congress passed. *Id.* at 25,721; see also *id.* at 29,188 (remarks of Rep. Derwinski) (stating that "wages, fringe benefits, and number of employees in an agency" remain beyond the scope of collective bargaining).

3. The court of appeals acknowledged that "some legislators' remarks baldly assert that wages are not negotiable." Pet. App. 12a. Yet it dismissed those statements as irrelevant because, in its view, other comments "indicate that the legislators merely were assuring their peers that the [statute] would not supplant specific laws which set wages and benefits." *Ibid.*; see H.R. Rep. No. 1403, 95th Cong., 2d Sess. 12 (1978) (fringe benefits are excluded from bargaining "because they are specifically provided for by statute"); 124 Cong. Rec. 29,174 (1978) (remarks of Rep. Collins) (criticizing the bill because it excluded from bargaining "those few [matters] specifically prescribed by law—for example, pay and benefits"). But these comments, which relate the prohibition against wage negotiation to the fact that Congress sets the wages of most federal employees, do not say or suggest that only the wages of such employees cannot be negotiated. Thus they do not conflict with the repeated statements in the legislative history that wages are not negotiable at all, and those statements are consistent with the most natural reading of the statutory language. "[T]he presumption that legislators mean what they say would seem more appropriate than the opposite presumption." *K Mart Corp.* v. *Cartier Corp.*, 108 S. Ct. 1811, 1824 n.4 (1988) (Brennan, J., concurring in part and dissenting in part).[11]

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[11] The court of appeals also noted (Pet. App. 11a) that, in discussing Section 7103(a)(14)(C), which removes from the definition of "conditions of employment" matters that are "specifically provided for by Federal statute," Representative Clay stated that "where a statute merely vests authority over a particular subject with an agency official with the official given discretion in exercising that authority, the particular subject is not excluded by this subsection from the duty to bar-

The court of appeals also based its holding on two decisions of the FLRA's predecessor, the Federal Labor Relations Council (FLRC), which "allowed federal employees to negotiate wages in the rare instances where Congress did not specifically establish wages and fringe benefits." Pet. App. 12a (citing *Overseas Education Association, Inc. and Department of Defense, Office of Dependents Schools*, 6 F.L.R.C. 231, 231 (1978), and *United Federation of College Teachers and U.S. Merchant Marine Academy*, 1 F.L.R.C. 211, 212 (1972)). The court noted the provision of 5 U.S.C. 7135(b) that pre-CSRA decisions remain in effect "unless superseded" and said that "Congress should have known" of the two FLRC decisions. Pet. App. 12a-13a.

The court of appeals' reliance on the two FLRC decisions is misplaced. First, the prior law was superseded by Section 7102(2), which provides that only "conditions of employment" are negotiable.[12] As we have shown, Congress has long understood that

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gain over conditions of employment." 124 Cong. Rec. 29,187 (1978). However, Representative Clay nowhere suggested that pay is among those discretionary issues that are bargainable under any circumstances. In view of his assurances that pay is not negotiable under the bill, the court of appeals' conclusion that he thought otherwise, based on his statement with respect to Section 7103(a)(14)(C), "puts Congressman Clay at war with himself over the issue." *Military Sealift Command*, 836 F.2d at 1418.

[12] The language of Section 11(a) of Executive Order No. 11,491 (see 5 U.S.C. 7101 note), which governed federal-sector labor relations prior to 1978 and made "working conditions" negotiable, is admittedly similar to the definition of "conditions of employment" in Section 7103(a)(14). But the Executive Order did *not* use the phrase "conditions of employment."

phrase not to include wages, and the legislative history of Title VII of the CSRA confirms that the phrase was not given a different meaning here. Thus, the assumption of the court below that Congress intended the FLRC decisions to continue in force "is plainly inapposite in a situation, such as the case at hand, where Congress has clearly expressed its intent to the contrary." *Department of Defense Dependents Schools*, 863 F.2d at 993 n.9.[13]

Second, the two FLRC decisions are nowhere mentioned in the legislative history and it appears that Congress was unaware of them. Indeed, in describing federal labor relations practices under the Executive Order, Senator Sasser told his colleagues that "Federal employees may not bargain over pay or fringe benefits." 124 Cong. Rec. 27,549 (1978); see *id.* at 24,286 (statement of Rep. Clay) ("employees still * * * cannot bargain over pay" under Title VII of the CSRA). Thus, to the extent that Congress intended to continue pre-CSRA bargaining practices, it evidently believed that, under those practices, wage bargaining was not allowed.[14]

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[13] Moreover, the issue whether wages are "working conditions" was not squarely presented (or addressed by the FLRC) in either case. Rather, the question presented in both cases was whether the proposals at issue were contrary to other statutes and regulations—a question analogous to the *third* question presented here. Thus, at most, the FLRC decided only sub silentio that compensation was a negotiable working condition.

[14] Furthermore, the two FLRC cases are inapposite because, in both cases, the proposals at issue sought to implement the governing law. In *United Federation of College Teachers*, teachers at the Merchant Marine Academy, who were to be paid salaries comparable to those paid at the Naval Academy, made proposals that "fall within the range of 'comparability'

4. Finally, given that wages are the central subject of collective bargaining in the private sector, common sense suggests that Congress would not authorize collective bargaining over the wages and fringe benefits of federal employees through "vague intimation or oblique reference." *Nuclear Regulatory Commission*, 879 F.2d at 1228. Moreover, federal wage bargaining would involve not only negotiation but third-party *arbitration* when an impasse was reached. Such a process would effect a "withdrawal of political accountability in public-sector compensation that substitutes for the competitive pressures constraining private-sector collective bargaining." *Id.* at 1231. Thus any determination that Congress has authorized wage bargaining for federal employees should be supported by convincing evidence. See also *Fort Knox Dependent Schools*, 875 F.2d at 1182 ("[i]t is obvious that salary and fringe benefits are the items most likely to involve substantial overspend-

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or 'similarity.'" 1 F.L.R.C. at 212. Similarly, in *Overseas Education Association*, which involved teachers at overseas schools operated by the United States government who were to be paid salaries comparable to those paid in large urban school districts in the United States, the proposal at issue implemented the governing statute by providing that salaries would be determined by sampling a geographically diverse set of cities constituting 60% of the school districts in cities with populations of over 100,000. The FLRC found "no indication" that the proposal would fail to implement the statute properly. 6 F.L.R.C. at 233. Here, in contrast, the majority of the proposals at issue—including the proposed 13.5% pay raise—do not purport to be modeled on practices at comparable public schools in the State, as the dependents schools statute provides. Thus, even if the two FLRC decisions did support the conclusion that bargaining over wages is appropriate in some circumstances, they would not support the conclusion that the proposals here are negotiable.

ing if left to collective bargaining"). Unlike all the instances in which Congress has authorized bargaining over wages, no such clear evidence exists in this case.[15]

II. THE PROPOSALS INTERFERE WITH THE AGENCY'S RIGHT TO SET ITS BUDGET

The "management rights" provision of Title VII of the CSRA, 5 U.S.C. 7106(a), provides that agency management need not bargain over certain specified matters. That provision was enacted in order to give the federal government "the power to manage and the flexibility that it needs." 124 Cong. Rec. 29,182 (1978) (remarks of Sen. Udall). Through the "broad statement of management rights" (H.R. Rep. No. 1403, 95th Cong., 2d Sess. 12 (1978)), Congress "specifie[d] areas for decision which are reserved to the President and heads of agencies, which are not subject to the collective bargaining process" (S. Rep. No. 969, 95th Cong., 2d Sess. 12-13 (1978)).

Among the rights listed in Section 7106(a) is management's right to set the budget: the statute provides that nothing in Title VII of the CSRA shall "affect the authority of any management official of any agency—(1) to determine the * * * budget * * * of the agency." Accordingly, proposals that would affect the agency's budget implicate matters on which the agency "may not negotiate under any circum-

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[15] If the Court reverses the decision of the court of appeals on the basis that compensation is not a negotiable condition of employment, then, as Chairman Calhoun concluded (Pet. App. 46a), all of Proposals 2 and 3 are non-negotiable, and all but subparts A and D of Proposal 1 (which appear merely to require Fort Stewart to inform and consult with the Union) are non-negotiable.

stances." H.R. Conf. Rep. No. 1717, 95th Cong., 2d Sess. 153 (1978); see H. R. Rep. No. 1403, *supra*, at 43 ("Management may not bargain away its authority to make decisions in these areas"); 124 Cong. Rec. 27,539 (1978) (remarks of Sen. Percy) (agency budgets are "[s]pecifically excluded from the scope of bargaining").

The FLRA has decided that a proposal is nonnegotiable on acount of management's right to control the agency budget if the proposal "will result in significant and unavoidable increases in costs not affected by compensating benefits." Pet. App. 36a (citing *American Federation of Government Employees, AFL-CIO and Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio*, 2 F.L.R.A. 604 (1980)). Almost all proposals have some costs and some effect on agency expenditures, and, accordingly, a rule that a proposal is not barred unless it has more than a de minimis budgetary effect seems reasonable. However, the application of the FLRA's rule here—particularly the conclusion that the proposal calling for a 13.5% pay raise would not significantly affect the agency's budget—is plainly flawed. And the other aspect of the FLRA's rule—requiring management to show that a significant increase in costs would not be offset by compensating benefits—is not reasonable or consistent with the statute, because it negates management's right to set the agency budget. The decision whether benefits are worth the cost lies at the heart of the budget process.

1. Contrary to the FLRA (Pet. App. 37a) and the court of appeals (*id.* at 20a), the proposals here, if adopted, would have a significant impact on the budget of the Fort Stewart Schools. "Teacher salaries" are "by far the largest item in any school's

budget." *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1, 11 (1973). A 13.5% across-the-board pay raise for teachers would therefore have a "significant" effect on the school budget under any reasonable use of the term. Even apart from the increase in expenditures that implementation of the proposal would require, the proposal would have a "significant effect" by depriving management of control over the major item in its budget. And in this case, the proposed pay raise would substantially increase the agency's costs.[16]

The court of appeals considered the costs of the Union's proposals insignificant only because it compared the increase in the cost of operating the dependent schools to the Army's budget as a whole, including the cost of "bases, troops, weapons, vehicles, other equipment, salaries for all other officers, and expenses for its eight other schools." Pet. App. 20a. That approach makes no sense. Whether a proposal will have a significant budgetary effect should be tested by comparison with the expenditures of the program employing the bargaining unit employees, not the entire agency budget. Otherwise, few proposals could be found to have "significant" effects, and the budget right would be a virtual nullity. That consequence is especially clear in this case. Given the Army's share of the defense budget, any proposal involving dependents schools could only amount to a tiny percentage of the Army's total expenditures, or

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[16] Whether each of the various subparts of Proposals 1 and 3 would have a significant effect is not as clear. If the Court reverses the decision below on the basis of the budget question alone, it may wish to remand the case with instructions that the FLRA reconsider the negotiability of the other proposals under the appropriate standard.

even of its salaries for personnel.[17] Thus, if Congress's judgment that agency management must have control over the agency budget is to be honored, the effect of a proposal must be tested against the program budget, not the agency budget.[18]

2. The FLRA's requirement of proof that a proposal would not have compensating benefits is unreasonable and contrary to the statute. It is unreasonable because it requires the agency to prove a negative—a requirement it could seldom, if ever, satisfy. In this case, for example, the only compensating benefit that has been suggested is that higher salaries and improved benefits will "attract better, harder-working teachers." Union's Br. in Opp. 18. That the FLRA is willing to rely on such an assertion indicates that any proposal to increase compensation would, in its view, be negotiable.

The compensating benefits requirement is contrary to the statute because "the FLRA's test makes itself, not the agency, the arbiter of the agency's budget."

[17] In fiscal year 1989, Congress appropriated more than $24.48 billion for pay and allowances for the military personnel employed by the Army. Department of Defense Appropriations Act, 1989, Pub. L. No. 100-463, 102 Stat. 2270.

[18] The Union argues (Br. in Opp. 17-18) that the language of the management rights provision, which states that management has control over the budget "of the agency," supports the conclusion that a proposal must be tested against the agency budget as a whole. But read literally, Section 7106(a)(1) gives management *unfettered* control over the budget. While we concede that some sort of de minimis test should be employed so that the scope of bargaining is not restricted unduly, nothing in the language of the statute requires such a test. Moreover, although it is appropriate to restrict the literal language of the budget right so as not to eclipse the bargaining obligation, it is not necessary to render the budget right meaningless.

Nuclear Regulatory Commission, 879 F.2d at 1233. A budget is "a plan for the coordination of resources (as of money or manpower) and expenditures." *Webster's Third New International Dictionary* 290 (1981). The quintessential decision that a federal agency makes when determining its budget is whether the benefits that flow from a given allocation of resources exceed its costs. See Exec. Order No. 12,291, 3 C.F.R. 127 (1982) (requiring cost-benefit analysis for agency actions). Thus, to preserve to management the right to determine the agency's budget, as Congress did, is to say that it is up to management, and management alone, to determine the optimal allocation of the agency's resources. See *Nuclear Regulatory Commission*, 879 F.2d at 1233 ("Congress * * * has vested the NRC with the responsibility of balancing employee compensation against the agency's other goals").

III. THE PROPOSALS ARE INCONSISTENT WITH AN ARMY REGULATION FOR WHICH THERE IS A "COMPELLING NEED"

Federal agencies are not required to bargain over "matters which are the subject of an[] agency rule" for which there is a "compelling need." 5 U.S.C. 7117(a)(2).[19] Section 241(a) of the dependents schools statute directs the government to provide an educa-

[19] The Authority has set forth "illustrative criteria" for determining whether an agency regulation is supported by a compelling need. Under these criteria, a compelling need exists for an agency regulation if the regulation "implements a mandate to the agency * * * which implementation is essentially nondiscretionary in nature" (5 C.F.R. 2424.11(c)), or if the regulation "is essential, as distinguished from helpful or desirable, to the accomplishment of the mission or the execution of functions of the agency" (5 C.F.R. 2424.11(a)).

tion comparable to that provided by local public schools, while Section 241(e) requires the Army to do so at a comparable per-pupil cost. The Army's dependents schools regulation (Army Reg. 352-3, 1-7 (h)) implements the mandate of Sections 241(a) and 241(e) by stating that the education provided by Section 6 schools "will be considered comparable to free public education offered by selected communities of the States" when various factors, including "salary schedules," are, "to the maximum extent practicable, equal." It is undisputed that the proposals at issue, most of which do not purport to make teachers' compensation at the Fort Stewart Schools comparable to that provided at public schools in the State, are contrary to the regulation.[20]

Section 241 does not specifically provide that teachers' salaries at dependents schools must be set by comparison with those at local public schools.[21] But

[20] Accordingly, if the Court reverses the decision below on the ground that the proposals conflict with the Army's regulation, all of Proposals 2 and 3 would be non-negotiable. All of Proposal 1 except for subparts A and D, which appear to assume (contrary to the other proposals) that compensation is to be set by comparison with local public schools, would also be non-negotiable.

[21] If it did, then proposals relating to compensation would be non-negotiable under Section 7103(a)(14)(C), which provides that "conditions of employment" do not include matters that are "specifically provided for by Federal statute." An explicit statutory direction that teachers' salaries are to be set by comparison with those of their counterparts at public schools would "specifically provide[] for" the matter. Respondents should not disagree on this point, as they concede (see Union's Br. in Opp. 16) that craft employees subject to the Prevailing Rate Act may not bargain about their compensation.

Congress recognized the importance of teachers' salaries in the dependents school statute by stipulating that "[f]or the purpose of providing such comparable education," teachers' salaries and benefits "may be fixed without regard to the Civil Service Act." 5 U.S.C. 241(a). Because teachers' salaries are such an important component of per-pupil costs, it is a fair reading of the statute to conclude that Congress excepted them from the civil service laws so that they would be set by comparison with those at public schools.[22] Thus, even in the absence of the regulation, proposals relating to teachers' compensation would appear to be non-negotiable under Section 7117(a)(1) as "inconsistent with * * * Federal law."

In any event, the Army has promulgated the regulation at issue. And because education is so labor-intensive, there is a compelling need for that regulation within the meaning of Section 7117(a)(2).[23] In view of Section 241(e)'s requirement of comparable per pupil costs, any substantial increase in teacher salaries at dependents schools would force substantial

[22] It is not clear that Congress intended that all ten of the factors listed in the Army's regulation, including those that do not directly and substantially affect per-pupil costs, be set by comparison with public schools.

[23] The FLRA suggests in 5 C.F.R. 2424.11 that there is a compelling need for a regulation only if it implements a statutory mandate that leaves an agency absolutely no room for discretion. But that cannot be the rule. If it were, there would be no case where a proposal was not exempted from negotiability under Section 7117(a)(1) as inconsistent with federal law, but nevertheless was exempted under Section 7117(a)(2) as contrary to an agency regulation for which there is a compelling need. In other words, under the FLRA's rule, Section 7117(a)(2) would add little or nothing to Section 7117(a)(1).

cutbacks elsewhere. And if, for example, the schools decided that in order to offset a salary increase they had to hire fewer teachers, thereby adversely affecting the pupil-teacher ratio, parents justifiably would complain that the Army was not complying with Section 241(a)'s mandate to provide an education comparable to that provided at local public schools. Thus, the Army's regulation is surely correct when it states that, in designing a system to provide an education comparable to that at public schools in the State at a comparable per-pupil cost, it is necessary to pay teachers comparable salaries.[24]

The primary basis for the court of appeals' decision to overturn the Army's regulation was its conclusion that the Army can provide a comparable education at a comparable per-pupil cost "notwithstanding large variations in the employees' wages because many expenses beyond their salaries enter into the per pupil expenditures." Pet. App. 18a. But the court gave no useful guidance as to "how this legerdemain might be accomplished." *Fort Knox Dependent Schools*, 875 F.2d at 1182. It is fanciful to say

[24] Maintaining equality of teacher salaries is also important in furthering Congress's goal of assisting those local school systems that suffer adverse economic effects caused by their proximity to large federal installations. § 1, 64 Stat. 1100-1101; S. Rep. No. 2458, 81st Cong., 2d Sess. 1-2 (1950); H.R. Rep. No. 1137, 95th Cong., 2d Sess. 1-3 (1978). If the Section 6 schools paid more and had appreciably more desirable leave and benefit policies than neighboring local school systems, those systems would probably be forced to match salary and benefits or suffer a loss in the quality of their personnel. Thus, increases in compensation due to collective bargaining proposals submitted by teachers at dependents schools would place an economic burden on local school systems that would undermine the statute's goal of assisting—not burdening—the local public schools.

that the Army can permit a 13.5% increase in salaries, or a significant increase in paid leave and benefits, and still provide a comparable education at a comparable per-pupil cost. The court's suggestion that the schools might cut back on "books, building maintenance, athletic programs, clubs, and lunch services" (Pet. App. 19a) is not helpful, since such costs are a relatively small percentage of any school system's budget. See Simon, *The School Finance Decisions: Collective Bargaining and Future Finance Systems*, 82 Yale L. J. 409, 418 & n.36 (1973). Even if the deficit could be made up by drastically cutting non-wage expenditures, it would be unlikely that the resulting education would be comparable. As the court of appeals acknowledged, "[m]any factors other than teachers' compensation also affect the quality of education." Pet. App. 19a. A school system that promotes teacher compensation to the exclusion of those other factors cannot provide an education comparable to local public school systems that treat teacher compensation as one factor among many contributing to a quality education.[25]

[25] The court of appeals also stated (Pet. App. 14a) that to interpret "comparable education" to require "comparable salaries" would be impermissible because it would render redundant Section 241(a)'s requirement that teachers employed in U.S. territories receive "compensation * * * on the same basis as provided for similar positions in the public schools in the District of Columbia." (Under Section 241(a), schools in the territories are to be comparable to schools in the District of Columbia.) But in fact, as the legislative history of that provision shows, it was intended simply to "unequivocally align" the salaries of teachers in the territories with those of the D.C. public schools, not to establish a new statutory requirement. See H.R. Rep. No. 1137, 95th Cong., 2d Sess. 108 (1978). In any event, since the cost of living in the territories might be significantly different from the cost of living in the

The court of appeals also noted (Pet. App. 19a) that Section 241(a) and Section 241(e) both require compliance with the obligations they impose "to the maximum extent practicable." But, contrary to the court of appeals' suggestion, these provisos do not confer a wide-ranging grant of discretion. To the contrary, the statute mandates comparability to the *maximum* extent practicable. Through the provisos, Congress has provided a limited safety-valve permitting the Army to diverge from the statutory mandates when, as a practical matter, it would be extremely difficult to comply with them. There is no contention that the proposals here are justified by considerations making comparability impractical. And there is no reason to interpret the provisos to overrule the rest of the statute by authorizing bargaining over proposals that do not purport to be based on practices at local public schools.

District of Columbia, there might be some question as to whether it was necessary to pay the same salary in the territories to hire comparable teachers. But there is no serious question that a comparable education requires comparable teachers' salaries where, as here, the Army has been directed to provide an education comparable to that provided by public schools in the same State where the dependents schools are located.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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* The Solicitor General is disqualified in this case.

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QUESTIONS PRESENTED

Whether, when enacting the Federal Service Labor-Management Relations Statute, Congress clearly expressed an intent to authorize those employees whose salaries are not set by statute to continue to bargain over wages as they had under the Executive orders that previously governed Federal sector collective bargaining? If Congressional intent is silent or ambiguous with respect to this issue, whether the FLRA's finding that wages are a negotiable "condition of employment," except when specifically set by statute, is a permissible construction of the FSLMR Statute?

Whether the FLRA's finding that the Army failed to demonstrate that the Association's compensation proposals would interfere with management's authority to determine the budget of the agency was arbitrary and capricious?

Whether the FLRA's finding that the Army failed to demonstrate a compelling need for a regulation that provides that salary schedules for the teachers at its dependents schools should be equal to those in neighboring public school districts was arbritrary and capricious?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-65

FORT STEWART SCHOOLS,
Petitioner

v.

FEDERAL LABOR RELATIONS AUTHORITY and
FORT STEWART ASSOCIATION OF EDUCATORS,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR RESPONDENT FORT STEWART ASSOCIATION OF EDUCATORS

STATEMENT

The Fort Stewart Association of Educators (an affiliate of the National Education Association) is the certified collective bargaining representative of the 114 teachers, 94 teacher assistants, 10 clerical workers, and 12 custodial workers employed by the Army at two elementary schools at Fort Stewart, Georgia. The negotiability dispute in this case arose during the negotiations that took place during the fall of 1984 for the Association's first collective bargaining agreement and concerns employee compensation and leave.

The salaries for teachers at Fort Stewart are ostensibly set by the Army based on a survey of the salaries paid to teachers in three public school districts of Georgia. Not all teachers at Fort Stewart are paid the same

salary, of course. The salary schedule developed by the Army has a different pay lane for each of four levels of academic attainment—bachelor's degree, master's degree, "educational specialist" for those with a specialized six-year degree, and doctoral degree. Within each pay lane are eighteen steps[1]—one for each creditable year of teaching experience. The higher a teacher's educational attainment and the greater his or her years of teaching experience, the higher his or her pay. The paraprofessional teacher assistants represented by the Association have their own salary schedule based on years of experience.

The text of the proposals at issue are found in the Federal Labor Relations Authority's decision and are reproduced in appendix B to the petition for certiorari. The Association's proposal for article 25 is identified as proposal 1 in the FLRA's decision. Article 25, §§ a-g concern the manner in which the results of the Army's annual pay survey are applied to Fort Stewart teachers. Article 25(a) sought to contractually commit the Army to base its salary survey on the practices in three particular school districts and to consult with the Association in the annual development of the salary schedule. Article 25(b) would require the Army to establish four more steps in each pay lane so that teachers would get an experience-based salary increase for up to twenty years of teaching experience instead of sixteen. Article 25(c) would have required the Army to establish the same pay lanes for different levels of academic attainment established by the Georgia school districts surveyed. Article 25(d) requires the Army to supply the survey data to the Association for independent analysis. Article 25(e) would require that whatever annual salary increase is justified on the basis of the survey of local

[1] At the time of negotiations, the salary schedule contained sixteen steps.

school districts should be applied "across the board." That is to say, each teacher on each step of each pay lane should be given the same percentage increase. Article 25(g) provides that when a teacher obtains a higher degree during the course of a particular school year, she will be placed in the next appropriate pay lane retroactive to the start of the school year. Pet. Cert. 31a-33a.

The other subsections of article 25 pertain to other pay and benefit practices. Article 25(h) concerns the pay of the clerical and janitorial staff represented by the Association. Although all Section 6 school employees are exempted from the coverage of the Classification Act, 5 U.S.C. § 5101, *et seq.*, and other Federal pay laws by 20 U.S.C. § 214(a), the Army has chosen to peg the salaries paid to noneducational personnel at the Fort Stewart Schools and at other Section 6 schools to the General Schedule pay rates applicable to other Federal employees covered by the Classification Act who hold comparable positions. *See generally In the matter of Fort Rucker Elementary School Employees*, 58 COMP. GEN. 430 (1979). The Association proposed in article 25(h) that the procedure that the Army was using to set the pay of clerical and custodial workers be continued. Article 25(i) would require the Army to pay summer-school teachers the same rate of pay, computed on an hourly basis, that they would receive during the regular academic year. Article 25(j) would entitle any bargaining unit member whose services are terminated by the Army to receive the value of his or her unused sick leave in a lump-sum payment. The Association's proposals for articles 25(n) and (o) are quite innocuous. They merely require the Army to continue to give unit employees those health insurance, life insurance, retirement, and other benefits that they already receive pursuant to law. Pet. Cert. 33a-34a.

During the course of negotiations, the Association also made an alternative proposal to give all unit employees a 13.5% salary increase for the 1984-85 school year.

This is identified as proposal 2 in the FLRA's decision. Pet. Cert. 34a. The proposal is not as generous as it seems at first blush. The teachers at Fort Stewart received a 6.8% pay increase at the beginning of the 1984-85 school year and an additional midyear pay raise of 4%, anyway. The Association proposed, in effect, only a 2.7% wage increase for teachers.

Proposal 3 in the FLRA's decision under review concerns employee-leave entitlement and procedures. Pet. Cert. 48a-53a. The text of this proposal is an Association counterproposal that incorporates various sections initially *proposed by management*. Many of the provisions are nothing more than a memorialization of the existing written and unwritten leave practices at the Fort Stewart Schools. For example, section 1 provides that the clerical and custodial staff be entitled to the same leave that Federal employees usually receive under civil service leave statutes and regulations. Section 1 was management's proposal and is existing practice. Although all Section 6 school employees are exempt from mandatory coverage of the standard Federal employee-leave laws, the Army has in its discretion applied the provisions of those laws to the support staff at its schools, just as it has voluntarily applied the General Schedule pay scales of the Classification Act. Proposed section 2(a) grants each teacher 13 days of sick leave each year. This proposal was lifted from the teachers' individual personal service contracts.[2] Section 2, subsections (a)(1) and (a)(2)

[2] Each teacher at Fort Stewart and most other Army Section 6 schools is given an annual personal service contract even though two circuits have held that their use by the Army is illegal. *Fort Bragg Association of Educators, NEA v. FLRA*, 870 F.2d 698 (D.C. Cir. 1989); *West Point Elementary School Teachers Association v. FLRA*, 855 F.2d 936 (2nd Cir. 1988). The Army selectively incorporates various terms and conditions of a teacher's employment in these personal service contracts. The FLRA has ruled that the use of the personal service contracts does not diminish the Army's collective bargaining obligations and that the provisions

concern the conditions under which teachers may take sick leave. These proposals, along with proposed section 2(a)(7), which requires management and the Association to discuss the establishment of a sick-leave bank, were eventually agreed to by the parties after the negotiability appeal was filed and were incorporated into the parties' collective bargaining agreement of January 9, 1985, as article 24, sections 1, 2, and 3.[3] This agreement is still in force. Subsections a(3), a(4), and a(5) place limits on the ability of unit employees to use sick leave and involve no cost to the Army. Subsections (a)(3) and a(4) were management's proposals. They were included in the negotiability appeal when management broadly declared that all leave proposals were nonnegotiable.[4]

Section 2(b) of the leave proposal permits teachers to use three days of sick leave each year for personal reasons. This is also current practice at the Fort Stewart Schools. Subsection 2(b)(3) is also a management proposal.

Section 2(c) of the leave proposal establishes a procedure by which management *may* grant teachers a year of *unpaid* leave for "advanced study, research, professional writing and other experience of recognized value

of a collective bargaining agreement prevail over contradictory provisions contained in the personal service contracts. *West Point Elementary School Teachers Association, NEA and the United States Military Academy Elementary School, West Point, New York*, 29 F.L.R.A. 1531, 1533 (1987).

[3] The Fort Stewart collective bargaining agreement was subject to and did receive agency head approval pursuant to 5 U.S.C. § 7114(c). The Association is without explanation why the Army subsequently included these proposals within the scope of its petition for review of the Authority's decision in the Eleventh Circuit.

[4] *See* October 22, 1984, letter of Malcolm Katz attached to the Association's November 8, 1984, negotiability appeal, reproduced at p. 5 of Certified Extracts of Record in the court of appeals.

in an employee's respective field." [8] Subsections 2(c)(1) through 2(c)(4) were management proposals.

Section 2(d) provides that employees summoned to jury duty will receive paid court leave. This management proposal is current practice. FORT STEWART SCHOOLS TEACHER HANDBOOK, 32 (1989-90 ed.) Its provisions are identical to the civil service laws and regulations applicable to other Federal employees. *See* 5 U.S.C. § 6322; OFFICE OF PERSONNEL MANAGEMENT, FEDERAL PERSONNEL MANUAL, chapter 630, subchapter 10.

Finally, section 2(e) would entitle employees to use sick leave for maternity purposes and leave without pay for paternity and adoption leave. These, too, were management's proposals, which were subsequently declared nonnegotiable by management.

SUMMARY OF ARGUMENT

1. The Federal Service Labor-Management Relations Statute permits Federal sector unions to negotiate over those "conditions of employment" that are not "specifically provided for by Federal statute." The plain meaning of the term "conditions of employment" encompasses employee compensation. Congress used the term "conditions of employment" synonymously with "wages" and

[8] With the exception of subsection 2(c)(7), which allows unit employees to attend professional conferences and workshops *subject to the school superintendent's approval*, this proposal entails *no cost* to the Army. The cost entailed in subsection 2(c)(7) would be voluntarily incurred by the Army inasmuch as the use of the five days of excused absence with pay for conferences and workshops is subject to the school's approval or disapproval on a case-by-case basis. Similarly, proposed sections 2(e)(2) and 2(e)(3) would establish paternity and adoption leave *without pay*. The Association is also without explanation why these proposals have been included among those for which review is sought by the Army since they have nothing to do with pay or pay-related fringe benefits.

"rates of pay" in another major Federal collective bargaining statute on which the FSLMR Statute was based, the National Labor Relations Act.

"Conditions of employment" is defined in the FSLMR Statute as "personnel policies, practices and matters . . . affecting working conditions." 5 U.S.C. § 7103(a)(14). That definition was taken directly from the Executive orders that governed Federal sector collective bargaining prior to the enactment of the Statute. Under the Executive orders, those employees whose salaries were not set by law bargained over wages. The Federal Labor Relations Council had ruled that wages for such employees were "negotiable as 'personnel policies and practices and matters affecting working conditions' under section 11(a)" of Executive Order No. 11,491.

When Congress enacted the FSLMR Statute, it expressly intended to codify the full scope of bargaining that existed under the Executive orders. When referring to the right of certain employees to negotiate over wages, one of the statute's sponsors stated, "we should not now be narrowing the preexisting collective bargaining rights of any group of Federal employees." Congress went so far as to add a savings clause to the Civil Service Reform Act, of which the FSLMR Statute is a part, to preserve the right of skilled crafts workers who had bargained over wages since the first Executive order and before but who had since fallen under the coverage of the Prevailing Rate Act of 1972 and who would no longer be able to negotiate over wages because their pay became "specifically provided for by Federal statute." This demonstrates that Congress intended to preserve the full panoply of bargaining rights, including the right to negotiate over pay, that employees had enjoyed before the enactment of the FSLMR Statute.

The legislative history of the statute contains statements of various members of Congress indicating that pay would not be negotiable under the statute. It is clear,

however, that they were talking in general terms, assuring their colleagues that the bargaining provisions of the statute would not override other Congressionally enacted pay laws applicable to the overwhelming majority of Federal employees. These statements cannot be read as an intent to preclude negotiations over wages in all circumstances. Such a reading would conflict with the overriding purpose of the statute, which was simply to codify the bargaining rights that had been created by the Executive orders and would conflict with the savings clause Congress adopted to preserve skilled crafts workers' right to negotiate over wages despite the Prevailing Rate Act.

Even if the Court finds the legislative history to be ambiguous or contradictory on this issue, the Federal Labor Relations Authority's construction of the statute is permissible and reasonable, and the Court should defer to it. *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984).

2. The management rights clause of § 7106 was also adopted from the earlier Executive orders. The agency's right to determine its budget was not interpreted to preclude wage bargaining under the Executive orders. In enacting the FSLMR Statute, Congress clearly stated that the management rights clause should be construed more narrowly than it had been under the Executive orders. Therefore, § 7106 should not be construed to preclude negotiations over a matter that was previously subject to bargaining.

The court of appeals correctly ruled that in order to determine whether the Association's wage proposal interferes with the agency's right to determine its budget, the cost of the proposal must be judged against the budget of the agency as a whole, not just the budget of the program in which the teachers are employed. Even if the cost of the 13.5% wage proposal is judged on a school-level basis, the cost of the proposal is not significant.

The teachers at Fort Stewart received a 10.8% wage increase during the 1984-85 school year, and the difference of 2.7% could be offset by increased employee productivity or by reallocation of funds from some other aspect of the schools' program.

3. Only one of the Association's proposals is inconsistent with Army Regulation 352-3 and then only as applied to some, but not all, unit employees.

Although 20 U.S.C. § 241(a) requires that the Army provide its students with an education that is comparable to that provided in surrounding local school districts, § 241(a) does not require that the salaries paid to Section 6 school employees be equal to those paid in local public schools. Although the language mandating comparable education was contained in the original version of § 241 enacted in 1950, it was not until a 1965 amendment to § 241 that the Army obtained even the discretion to deviate from the pay laws applicable to other Federal employees. Even today, the Army continues to peg the compensation of some Section 6 school employees to that paid to other Federal employees with comparable duties, rather than to that paid to employees of local public schools.

Section 241(e) only requires that per-pupil costs at Section 6 schools not exceed those in local school districts "to the maximum extent practicable." All of the military services that operate Section 6 schools have long ago discovered that it is "not practicable" to limit their expenditures to those of local public schools. Each of the services, including the Army, dramatically exceeds comparable per-pupil costs in the Section 6 schools it operates. Therefore, § 241(e) can no longer be used as a bar to bargaining.

Furthermore, identical salary schedules will not produce identical compensation costs or per-pupil expenditures. The compensation costs at Fort Stewart and in the Geor-

gia public schools are already unequal because of the difference in the costs of retirement programs and other statutorily mandated employee benefits.

Even assuming that per-pupil expenditures at Fort Stewart were equal to those in Georgia public schools, the cost of the Association's proposal for a further 2.7% wage increase could be offset by other economies in the schools' program or increased employee productivity so that overall per-pupil costs would remain the same.

ARGUMENT

I. WHEN ENACTING THE FSLMR STATUTE, CONGRESS EXPRESSLY INTENDED TO AUTHORIZE THOSE EMPLOYEES WHOSE SALARIES ARE NOT SET BY STATUTE TO CONTINUE TO BARGAIN OVER WAGES AS THEY HAD UNDER THE EXECUTIVE ORDERS THAT PREVIOUSLY GOVERNED FEDERAL SECTOR COLLECTIVE BARGAINING

A. An examination of the language of the FSLMR Statute reveals that wages are a negotiable condition of employment unless they are specifically provided for by statute. Federal employees have the right "to engage in collective bargaining with respect to conditions of employment." 5 U.S.C. § 7102. "Conditions of employment" is in turn defined as:

> . . . personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions, except that such term does not include policies, practices, and matters—
>
> (A) relating to political activities prohibited under subchapter III of chapter 73 of this title;
>
> (B) relating to the classification of any position; or
>
> (C) to the extent such matters are specifically provided for by Federal statute.

5 U.S.C. § 7103(a)(14). Nowhere is the right to negotiate wages excluded from the definition of "conditions of employment" unless the employee's wages "are specifically provided for by Federal statute." If Congress intended to exclude bargaining on wages under all circumstances, it could easily have included wages among these three exclusions or phrased exclusion (B) to read "relating to the *pay* and classification of any position."

It would be specious to argue, as petitioner has, that negotiations over "working conditions" are limited to the physical conditions under which an employee labors. This would exclude the bulk of subject matters presently negotiated by Federal sector unions, including personnel policies and practices involving equal employment opportunity, merit promotion, training and career development, work scheduling, discipline, and the negotiation of grievance and arbitration procedures made mandatory by § 7121(a)(1). Such a limited reading of § 7103(a)(14) would effectively end collective bargaining in the Federal sector over everything but safety and office environment. If Congress had intended the definition of "conditions of employment" to be as limited as petitioner contends, there would have been no need to exclude from the definition "political activity" and "position classification." How can it be said that pay is not a working condition, but yet position classification, from which pay flows for most Federal employees, would be a working condition absent a specific exclusion?

The origin of the phrase "personnel policies, practices and matters . . . affecting working conditions" in § 7103 is no mystery. It was adopted verbatim from the earlier Executive orders governing collective bargaining in the Federal sector. The Executive orders provide a more reliable guide to discerning Congress's intended meaning of "conditions of employment" in the FSLMR Statute than do statutes unrelated to collective bargaining cited by petitioner that contain the same phrase. The

FLRA's predecessor, the Federal Labor Relations Council, held that wages were a negotiable working condition for employees whose compensation was not set by statute. The legislative history of the FSLMR Statute demonstrates that Congress's primary intent in enacting the statute was to codify the practices that arose under the Executive orders that had governed labor relations in the Federal sector without any diminution in the scope of bargaining. A statute should be construed so as to effectuate its "primary objective." *Ford Motor Company v. EEOC*, 458 U.S. 219, 228 (1982).

There is a long history of collective bargaining over wages in the Federal sector. At least as early as 1949, Congress exempted skilled crafts workers and semiskilled manual laborers from the Classification Act, which set Federal employees' pay. Act of Oct. 28, 1949, ch. 782, § 201, Pub. L. No. 81-429, § 201, 63 Stat. 954. The Bureau of Reclamation in the Department of Interior voluntarily has bargained over wages for such employees with such unions as the IBEW since the late 1940s. *U.S. Department of Energy, Western Area Power Administration, Golden, Colorado and IBEW Locals 640, et al.*, 22 F.L.R.A. 758, 802-803 (1986).

In 1961, President Kennedy appointed a task force, chaired by Secretary of Labor Arthur Goldberg, to formulate recommendations on a governmentwide labor-relations policy. The task force reported that numerous agencies had voluntarily recognized employee organizations and that the Tennessee Valley Authority and several components of the Department of Interior had developed "relationships that are close to full scale collective bargaining" with trade unions. PRESIDENT'S TASK FORCE ON EMPLOYEE-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE, A POLICY FOR EMPLOYEE-MANAGEMENT COOPERATION IN THE FEDERAL SERVICE (1961) *reprinted in* House Comm. on Post Office and Civil Service, Subcomm. on Postal Personnel and Modernization, 96th Cong., 1st

Sess., *Legislative History of the Federal Service Labor-Management Relations Statute*, 1187 (1979). The task force's report noted that "[t]he employer in most parts of the Federal Government cannot negotiate on pay, hours of work or most fringe benefits" because "[t]hese are established by law." *Id.* at 1200. The task force recommended a governmentwide labor-relations program that would permit bargaining over wages if not otherwise set by statute:

> Specific areas that might be included among subjects for consultation and collective negotiations include the work environment, supervisor employee relations, work shifts and tours of duty, grievance procedures, career development policies *and where permitted by law the implementations of policies relative to rates of pay and job classification.*

Id. at 1201 (emphasis added).

In a statement accompanying the published version of the task force report, President Kennedy directed that an Executive order be prepared to effectuate the task force's recommendations and noted "that where salaries and other conditions of employment are fixed by the Congress these matters are not subject to negotiations." *Id.* at 1178. Thus, those who developed the first governmentwide labor relations program intended that "salaries" were to be among the negotiable "conditions of employment" unless they were set by Congress.

Section 6(b) of Executive Order No. 10,988, 27 Fed. Reg. 551 (1962), reprinted in 1962 U.S. CODE CONG. & AD. NEWS 4269, 4271, issued by President Kennedy, authorized negotiations over "personnel policy and practices and matters affecting working conditions"—the same language that now appears in the FSLMR Statute at 5 U.S.C. § 7103(a)(14). President Nixon revised the Federal government's labor-relations program by Executive Order No. 11,491, 43 Fed. Reg. 17605 (1969). Section 11 of this Executive order required agencies to negotiate

"with respect to personnel policies and practices and matters affecting working conditions, so far as may be appropriate under applicable laws and regulations. . . ."

Section 4 of Executive Order No. 11,491 established the Federal Labor Relations Council, comprised of the Chairman of the Civil Service Commission, the Secretary of Labor, and an official of the Office of Management and Budget, and authorized it to resolve disputes governing the negotiability of collective bargaining proposals. In 1972 the FLRC was called upon to resolve a negotiability dispute concerning the Department of Commerce's obligation to negotiate over a wage increase for professors at the Merchant Marine Academy. In *United Federation of College Teachers, Local 1460 and U.S. Merchant Marine Academy*, 1 F.L.R.C. 211 (1972), the FLRC found that instructors at the academy were exempt from the Classification Act and that their salary proposals did not conflict with other Federal law, as was alleged by the Department of Commerce. The FLRC specifically held that the two wage proposals at issue were "negotiable as 'personnel policies and practices and matters affecting working conditions' under section 11(a) of the Order." *Id.* at 218. One of the proposals would have increased the faculty's salary by approximately 10%. *Id.* at 212.

In another case, the FLRC held that several pay proposals made by the association that represents the teachers in DOD's overseas dependents schools were negotiable under Executive Order No. 11,491 because they did not conflict with the Overseas Teachers Pay and Personnel Practices Act. *Overseas Education Association, Inc. and Department of Defense Dependents Schools*, 6 F.L.R.C. 231 (1978). One of the proposals at issue in that case provided that DOD would establish extra pay lanes if they were justified by a survey of the practices in stateside school districts and is similar to the Association's proposal 1(e) at issue herein. Another proposal made by the overseas teachers and found negotiable by the FLRC

provided that summer-school teachers would be paid the same salary rate they received during the regular academic year. That proposal is identical in all material respects to the Association's proposal 1(i) at issue in the case *sub judice*.

The enactment of the FSLMR Statute in 1978 "constitute[d] a strong congressional endorsement of the policy on which the Federal labor relations program had been based since its creation in 1962." *Bureau of Alcohol, Tobacco and Firearms v. FLRA*, 464 U.S. 89, 103 (1983). It is clear from the legislative history that Congress intended to expand, rather than constrict, the scope of bargaining that existed under the Executive orders. *National Treasury Employees Union v. FLRA*, 691 F.2d 553, 559 (D.C. Cir. 1982); *New York Council, Association of Civilian Technicians v. FLRA*, 757 F.2d 502, 508 (2nd Cir. 1985), *cert. denied*, 474 U.S. 846 (1988).[6]

The Senate Report stated that "[t]he scope of negotiations under this section is the same as under section 11 (a) of Executive Order 11491." S. Rep. No. 95-969, 95th Cong., 2d Sess. 104 (1978), *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS at 2826. Representative Derwinski stated that Title VII was intended to codify the existing bargaining practices, which developed under the Executive orders:

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[6] During early debate, Representative William Ford termed the expansion in the scope of bargaining "a very modest, incremental step." 124 Cong. Rec. 25,777 (1978). In later debate he stated that "the scope of bargaining would be substantially broadened from that permitted agency management under the [Executive] order." 124 Cong. Rec. 29,138 (1978). Representative Clay stated that in drafting Title VII of the Civil Service Reform Act, which became the FSLMR Statute, "the committee intended that the scope of bargaining under the act would be greater than that under the order as interpreted by the [Federal Labor Relations] Council." 124 Cong. Rec. 29,187 (1978). *See also* Supplemental Views to H.R. 11280, H.R. Rep. 95-1403, 95th Cong., 2d Sess. 377 (1978) (Title VII "broaden[s] the scope of bargaining beyond existing practices.").

> [T]he amendment is simply the administration's proposal for a flexible but orderly codification of the Executive orders which have successfully governed Federal labor-management relations since 1962. Four Presidents, two of each party, have managed to work with the guidelines embodied in this substitute, and now their successor has offered to codify the system into statutes which cannot, like Executive orders, be revoked by the White House at will.
>
> The substance of this amendment closely resembles the original program established by President Kennedy.

124 Cong. Rec. 29,188 (1978).

Thus, when it enacted the FSLMR Statute, Congress intended to preserve any and all collective bargaining rights that Federal employees enjoyed under the Executive orders—including, in limited circumstances, the right to bargain over wages. When referring to the right of prevailing-rate employees to negotiate over wages, Representative Ford stated, "we should not now be narrowing the preexisting collective bargaining rights of *any group* of Federal employees." 124 Cong. Rec. H8468 (daily ed. Aug. 11, 1978) (emphasis added). Despite the petitioner's claim that "it appears that Congress was unaware" of the FLRC decisions concerning pay negotiations, Congress is generally presumed to be knowledgeable about existing law pertinent to the legislation it enacts. *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, ——, 108 S.Ct. 1704, 1711-12 (1988); *Director, OWCP v. Perini North River Associates*, 459 U.S. 297, 319-20 (1983). When Congress adopts a new law incorporating sections of a prior law, Congress is presumed to know both the judicial and administrative interpretations of the incorporated law. *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978). When Congress codified without change language contained in Executive Order 11,491, it knew of and did not intend a change in the judicial and executive interpretation of that language. *Florida National Guard v. FLRA*, 699

F.2d 1082, 1087 (11th Cir. 1983); *United States v. PATCO*, 653 F.2d 1134, 1138 (7th Cir. 1981). "One such existing practice allowed Federal employees to negotiate wages in the rare instances where Congress did not specifically establish wages and fringe benefits." *Fort Stewart Schools*, 860 F.2d 396, 402 (11th Cir. 1988) (citing *United Federation of College Teachers, Local 1460 and U.S. Merchant Marine Academy*, 1 F.L.R.C. 211 (1972) and *OEA and DODDS*, 6 F.L.R.C. 231 (1978)).[7]

The petitioner has cited and analyzed the legislative history of the FSLMR Statute out of context. Although the Senate report does state that Title VII "excludes bargaining on economic matters," in the paragraphs immediately preceding that statement the Senate report makes clear that any collective bargaining rights that existed under Executive Order No. 11,491 were to be preserved by the new law:

> S. 2640 incorporates into law the existing Federal employee relations program. . . .
>
> The basic, well-tested provisions, policies and approaches of Executive Order 11491, as amended, have

[7] The failure of the House mark-up committee to adopt Representative Heftel's proposal to explicitly authorize pay negotiations so far as "consistent with law and regulation" is of no significance. The failure to enact suggested amendments is not the most reliable indication of Congressional intent. *Bob Jones University v. United States*, 461 U.S. 574, 600 (1983); *Bryant v. Yellen*, 447 U.S. 352, 376 (1980). Rather than indicating a desire to preclude pay negotiations by failing to adopt Representative Heftel's proposal, the committee may have viewed language that would explicitly authorize pay negotiations that were "consistent with law and regulation" as unnecessary surplusage inasmuch as the statute already authorized negotiations over *all* conditions of employment that are not provided for by statute. In *United States v. Wells Fargo Bank*, 108 S.Ct. 1179 (1988), this Court reasoned that the failure of the Finance Committee to adopt a specific proposal that project notes would be subject to estate taxes did not necessarily indicate a desire to exempt project notes from taxation. "Equally plausible is that the Committee omitted the express exemption as unnecessary." 108 S.Ct. at 1184.

> provided a sound and balanced basis for cooperative and constructive relationships between labor organizations and management officials. Supplemented by the Federal Labor Relations Authority to administer the program, and expanded arbitration procedures for resolving individual appeals, these measures will promote effective labor-management relationships in Federal agencies.

Senate report, *id.*, at 12. Immediately preceding Representative Udall's statement that "we do not permit bargaining over pay," Mr. Udall also stated that the statute "gives Federal employees greater rights in labor relations than they have heretofore enjoyed." 124 Cong. Rec. 25,716 (1978). Similarly, although Representative Clay stated that "employees still . . . cannot bargain[] over pay," he also stated immediately afterward that the statute adopted a position that "moves slightly beyond" existing bargaining practices. 124 Cong. Rec. 24,286 (1978). Although Senator Sasser stated that "Federal employees may not bargain over pay or fringe benefits," he was describing, however mistakenly, the practice under Executive Order 11,491, *not* the new FSLMR Statute.[6]

When the legislative history is read in both its immediate and historical context, it is clear that the statements were merely assurances that, as a general rule, wages would continue to be nonnegotiable for the overwhelming majority of Federal employees whose pay is set by stat-

[6] In context, the quote from Senator Sasser reads:

> Currently, Federal labor relations are governed by Executive Order 11491, as amended. The Executive order establishes the right of Federal employees to belong to unions and establishes procedures for the recognition of bargaining units. But the Federal labor relations program continues to differ in substantive ways from that of the private sector.
>
> For one, Federal employees are not allowed to strike. Also, exclusive representatives of Federal employees may not bargain over pay or fringe benefits.

124 Cong. Rec. 27,549 (1978).

ute. For example, Representative Ford stated that "no matters that are governed by statute (such as pay, money-related fringe benefits, retirement and so forth) could be altered by a negotiated agreement." 124 Cong. Rec. 25,777 (1978). Representative Udall stated that "[t]here is not really any argument in this bill or in this title about Federal collective bargaining for wages and fringe benefits and retirement. . . . All these major regulations about wages and hours and retirement and benefits will continue to be established by law through Congressional action." 124 Cong. Rec. 29,182 (1978). The court of appeals correctly concluded that:

> A close examination of the Congressional reports and debates reveals that the FSLMRA's supporters made these statements with the understanding that Congress generally regulates such matters through its prevailing rate acts, not with the understanding that the FSLMRA barred all wage negotiations. . . . Thus, although some legislators' remarks baldly assert that wages are not negotiable, the above comments indicate that the legislators merely were assuring their peers that the FSLMRA would not supplant specific laws which set wages and benefits.

Fort Stewart Schools, 860 F.2d at 401.

On the other hand, the legislative history reaffirms the principle, recognized as early as 1961 by the Goldberg task force, that any matters not specifically provided for by statute are negotiable. Representative Clay stated during debate:

> Section 7103(a)(14)(D), removing from subjects of bargaining those matters specifically provided for by Federal statute, was adopted by the Committee and retained in the Udall substitute with the clear understanding that only matters "specifically" provided for by statute would be excluded under this subsection. Thus, where a statute merely vests authority over a particular subject with an agency official given discretion in exercising that authority, the particular

> subject is not excluded by this subsection from the duty to bargain over conditions of employment.

124 Cong. Rec. 29,187 (1978).

B. The fact that Congress specifically authorized certain prevailing-rate employees to negotiate over pay in § 704 of the Civil Service Reform Act of 1978, 5 U.S.C. § 5343 note, does not indicate an intention to foreclose other employees from bargaining over pay. The Prevailing Rate Act, 5 U.S.C. § 5343, provides that the salaries of certain skilled crafts workers "shall be fixed and adjusted from time to time as nearly as is consistent with the public interest in accordance with prevailing rates" paid to similar crafts workers in the private sector. As noted earlier, before the Prevailing Rate Act was enacted in 1972, many of the skilled crafts workers now covered by the Act negotiated over wages. Section 9(b) of the Act, Pub. L. No. 92-392, permitted those employees covered by the Prevailing Rate Act who negotiated over pay prior to its enactment to continue to do so. 5 U.S.C. § 5343 note. When Congress enacted the Civil Service Reform Act of 1978, it provided in § 704 that those employees who continued wage negotiations pursuant to § 9(b) could continue to do so, notwithstanding the Prevailing Rate Act, the premium pay provisions of Title 5, and any contrary provision of the FSLMR Statute.[9] But not for this "grandfather" clause, these prevailing-rate employees would no longer be able to negotiate over wages under the FSLMR Statute because their pay would be a matter "specifically provided for by Federal statute," 5 U.S.C. § 7103(a)(14)(c), namely the Prevailing Rate Act. Indeed, the FLRA has held that other Prevailing Rate Act

[9] There are twenty bargaining units of Prevailing Rate Act wage grade employees represented by craft unions, such as the International Brotherhood of Electrical Workers and the Columbia Power Trades Council, that gained recognition before 1972 and are thus grandfathered by § 704. OFFICE OF PERSONNEL MANAGEMENT, UNION RECOGNITION IN THE FEDERAL GOVERNMENT, at 331-332, 351-352, 390 (1987).

employees who did not bargain over wages prior to 1972 are now foreclosed from doing so for this reason. *Army and Air Force Exchange Service, Dallas, Texas and AFGE*, 32 F.L.R.A. 591, 597, 600 (1988). Thus, § 704 was needed as an exception to the general rule that employees whose salaries are set by statute may not negotiate over wages; it has no bearing on the bargaining rights of those employees who are not subject to a pay-fixing statute.

Section 704 was also enacted to specifically overrule the effect of two Comptroller General decisions affecting Prevailing Rate Act employees and cannot therefore be taken as an indication of a desire by Congress to limit, by omission, the bargaining rights of other employees. In those decisions, the Comptroller General held that although § 9(b) exempted employees in certain bargaining units from the Prevailing Rate Act, the overtime provisions of 5 U.S.C. §§ 5541-5550 were still applicable and beyond the scope of bargaining. During debate, Representative Ford stated:

> During committee mark-up, I offered an amendment to add a new provision, section 704(c), which is intended to preserve the scope of collective bargaining heretofore enjoyed by certain trade and craft employees. . . . This provision is required because of two recent rulings by the Comptroller General which invalidated certain collectively bargained provisions and held that specific legislative authorization is necessary for these employees to continue to negotiate such provisions in accordance with prevailing private industry practice. Decisions Nos. B-189782 (February 3, 1978) and B-191520 (June 6, 1978).

124 Cong. Rec. 25,722 (1978). *See also* H.R. Rep. No. 1717, 95th Cong., 2d Sess. 159 (1978).

Thus, § 704 was added to overcome a roadblock to the bargaining rights of particular employees rather than as an exhaustive list of those employees who could negotiate

over pay issues. It does demonstrate, however, that Congress intended to preserve the right to negotiate over wages of all employees who had the ability to do so under the Executive orders. The petitioner offers no reason why Congress would have wanted to preserve the right of employees whose salaries were set by statute to bargain over wages under the FSLMR Statute and yet foreclose the right of those not established by law to continue wage negotiations. Section 704 also conclusively demonstrates that those members of Congress who stated during the debate that the FSLMR Statute does not authorize wage negotiations were speaking in general terms because they knew full well that certain insular groups of Federal employees would continue wage negotiations.

C. An examination of the language of the National Labor Relations Act also demonstrates that an employee's pay is a "condition of employment" in common and Congressional parlance. In Section 9(a) of the NLRA, 29 U.S.C. § 159(a), Congress included rates of pay and wages as examples of the conditions of employment over which exclusive representatives had the right to bargain:

> Representatives designated or selected for the purposes of collective bargaining by the majority of employees in the unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to *rates of pay, wages, hours of employment, or other conditions of employment*: . . .

(emphasis added). The use by Congress of the words "or other" between "rates of pay, wages" and "conditions of employment," rather than simply the word "or," demonstrates that Congress considered the latter term to encompass the former. The meaning of "conditions of employment" is not limited to the subject "hours of employment," which immediately precedes the conjunction "or," as the petitioner claims. Pet. Br. 18. Each subject that precedes the conjunction is an item in a series, parallel

to each other, and of equal rank. If "conditions of employment" were limited to the subject immediately preceding the conjunction, § 159 would be written "rates of pay, wages, *or* hours of employment *and* other conditions of employment."

The language of § 8(d) of the NLRA, 29 U.S.C. § 158(d), which requires both unions and employers to negotiate in good faith over "wages, hours and other terms and conditions of employment," does not demonstrate that wages were a negotiable *term*, but not a *condition*, of employment, as petitioner contends. Pet. Br. 18. The Army's faulty analysis ignores the fact that wages are referred to only as a condition of employment in the following section of the NLRA and the fact that § 8(d) was not added to the NLRA until the Taft-Hartley amendments of 1947, some fourteen years after the NLRA was originally enacted as the Wagner Act of 1933. Congress added § 8(d) in order to impose a mutual obligation to bargain in good faith on both employers and unions, where the Wagner Act imposed such a duty on the employer only. T. KHEEL, 4 LABOR LAW § 16.02[2] (1979). Section 8(d) did not change the scope or subject matter of bargaining in any way. More importantly, the words "term" and "condition" are synonymous. *Roget's International Thesaurus*, ¶ 507.2 (4th ed. 1977).

II. THE ARMY HAS FAILED TO DEMONSTRATE THAT THE WAGE INCREASE SOUGHT BY THE ASSOCIATION WOULD INTERFERE WITH ITS RIGHT TO DETERMINE ITS BUDGET

If Congress intended employees such as dependents' schoolteachers to continue to negotiate over wages, it would not have intended a construction of the budget rights clause in § 7106(a)(1) that would foreclose such bargaining. Both Executive Order No. 10,988 and Executive Order No. 11,491, under which wage negotiations took place, contained provisions preserving an agency's

right to determine its budget. Section 6(b) of Executive Order No. 10,988 provided that the agency's bargaining obligation "shall not be construed to extend to such areas of discretion and policy as the mission of the agency, [or] its budget. . . ." 1962 U.S. CODE CONG. & AD. NEWS 4271. Section 11(b) of Executive Order No. 11,491 closely mirrors the current management rights clause of 5 U.S.C. § 7106. In pertinent part, it reads:

> [T]he obligation to meet and confer does not include matters with respect to the mission of the agency; *its budget*; its organization; the number of employees; and the numbers, types, and grades of positions or employees assigned to an organizational unit, work project, or tour of duty; the technology of performing its work; or its internal security practices. This does not preclude the parties from negotiating agreements providing appropriate arrangements for employees adversely affected by the impact of realignment of work forces or technological change.

1969 U.S. CODE CONG. & AD. NEWS 2954. (emphasis added).

This management rights clause was not construed to prohibit wage negotiations—even the proposal for a 10% wage increase found negotiable in *United Federation of College Teachers, Local 1460 and U.S. Merchant Marine Academy*. Although Congress adopted most of the management rights enumerated in Executive Order No. 11,491, Congress intended that the management rights clause of § 7106 should be interpreted more narrowly than it was in the Executive order. Rep. Ford complained that the Federal Labor Relations Council's interpretation of the management rights clause "stifle[d]" collective bargaining, 124 Cong. Rec. 29,198 (1978), and that § 7106 should be "construed strictly." *Id.* at 29,199. Rep. Clay, one of the authors of § 7106, declared that "the management rights clause is to be construed as a narrow exception to the general obligation to bargain in good

faith." *Id.* at 29,187. The House Committee on the Post Office and Civil Service stated that:

> The committee's intention in section 7106 is to achieve a broadening of the scope of collective bargaining to an extent greater than the scope has been under the Executive Order program. . . . The committee intends that section 7106 . . . be read to favor collective bargaining whenever there is a doubt as to the negotiability of a subject or proposal.

H.R. Rep. No. 1403, 95th Cong., 2d Sess. 43-44 (1978). In light of this unequivocal expression of legislative intent, § 7106 *cannot* be read to preclude negotiations over a matter that was subject to bargaining before the statute's enactment.

Moreover, § 7106(a)(1) grants an agency the right to "determine" its budget. Proposals that merely have an economic cost without specifying what the agency's actual budget will be are negotiable. Virtually any collective bargaining proposal has some cost and impacts an agency's budget, including arbitration procedures and negotiations themselves.

The Army has no support for its argument that whether the union's proposals would significantly increase costs should be tested "by comparison with the expenditures of the program employing the bargaining unit employees, not the entire agency budget." Pet. Br. 29. The plain language of the statute is to the contrary. Absent a clearly expressed legislative intent to the contrary, the language of the statute must ordinarily be regarded as conclusive. *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). Section 7106(a) states that "nothing in this chapter shall affect the authority of any management official of any agency—to determine the . . . budget . . . *of the agency*." (emphasis added). "Agency" is defined by the statute as "an Executive agency." 5 U.S.C. § 7103(a)(3). For the purposes of title 5, "Executive agency" means an Executive De-

partment, a Government corporation, and an independent establishment. 5 U.S.C. § 105. The Department of Defense is an Executive Department and thus an Executive agency; the Fort Stewart school system is not. 5 U.S.C. § 101.[10]

The Association's proposal for a 13.5% pay raise does not entail either an unavoidable or a significant increase in costs, even if judged on a school-level basis.[11] The teachers at Fort Stewart received a salary increase of 10.8% during the 1984-85 school year, anyway. Other unit employees also received wage increases that year. Proposals for wage increases do not necessarily entail *any* increase in an employer's operating budget. As in private, state, and municipal sector collective bargaining, the cost of a union's proposed wage increase can be offset by management-sought concessions on productivity. And, of course, if the Fort Stewart schools lack financial ability to pay a salary increase sought by the Association without adversely impacting its educational program, it should refuse to agree to the proposal, make its arguments to the Federal Service Impasses Panel pursuant to 5 U.S.C. § 7119(b). Budget and financial constraints of a public-sector employer are proper the kinds of factors consid-

[10] The Fort Stewart School does not have a separate line item in the President's annual budget. The Department of Defense lumps the expenditures for all the domestic and overseas dependents schools into one line item under the heading of "Operations and Maintenance—Defense Agencies." The amount sought by DOD for its dependents schools for FY 1990 was approximately $1.1 billion. DEPARTMENT OF DEFENSE APPENDIX TO THE BUDGET FOR FISCAL YEAR 1990, I-G10 (January 1989). If the cost of the Association's proposal is measured against the budget of the program employing the teachers, it should be measured against the budget figure for the Department of Defense Dependents Schools, which is the smallest line item in the President's budget that covers the teachers.

[11] The Army admits that proposal 1 and proposal 3 may not impact on the agency's budget rights. Pet. Br. 29 n.16.

ered in interest arbitration and impasse resolution. F. ELKOURI & E. ELKOURI, HOW ARBITRATION WORKS, 832-835 (4th ed. 1985).

III. THE ARMY HAS FAILED TO DEMONSTRATE THAT THE ASSOCIATION'S PROPOSALS ARE INCONSISTENT WITH ARMY REGULATION 352-3 OR THAT THERE IS A COMPELLING NEED FOR THAT REGULATION

Army Regulation 352-3, 1-7 states that education in Section 6 schools will be considered "comparable" to that in the local public school districts when, "to the maximum extent practicable . . . salary schedules" are equal. Only proposal 2, which calls for a modest salary increase for all unit employees over that which the Army gave them anyway, is inconsistent with this regulation, and then only as applied to teachers. Subsections a-g of proposal 1 are procedures by which the salary survey will be conducted and its results analyzed and applied in developing the teachers' salary schedule. Subsection h of proposal 1 asks the Army to continue its practice of pegging support-staff salaries to comparable General Schedule pay rates applicable elsewhere in the Federal sector. It is important to note that despite the Army's claim that salaries for Section 6 school employees must be identical to salaries of employees in local school districts, the Army completely ignores its own regulation when setting the salaries of the support staff in its Section 6 schools. Furthermore, there is no evidence that salaries of the paraprofessional teacher assistants at Fort Stewart or at the Army's other Section 6 schools are set based on a survey of paraprofessionals' pay in local school districts rather than at the whim of the Army. Subpart i of proposal 1 asks the Army to pay summer-school teachers the same salary, on an hourly basis, that they receive during the regular school year, which is, presumably, based on pay in local school districts. Subpart k concerns the rate at which employees will be reimbursed for official use of personally

owned vehicles and does not concern salary rates at all. Subparts n and o concern unit employees' statutory entitlement to health and life insurance and retirement benefits. Title 20 U.S.C. § 241(a) does *not* exempt Section 6 school employees from laws establishing Federal employee health and life insurance and retirement benefits. Therefore, the practices of local school districts in those matters are irrelevant.

Proposal 3 concerns employee leave, paid and unpaid. The Army's regulation calls for comparability of "salary schedules" and makes no mention of leave. As noted earlier, the support staff at the Fort Stewart schools receives the same leave benefits that other Federal employees receive. Most of the proposals for teacher leave are either an embodiment of current practice or management's initial proposals or both. There is no indication that any of the leave provisions or benefits for teachers in proposal 3 differ from that which local public school employees receive or that the Army takes local public school practice into consideration when establishing teachers' leave benefits.[12]

Inasmuch as the Army sets the salaries of clerical and custodial workers at the Fort Stewart schools without regard to either the practices in local public schools or its own regulation, proposal 2 is not in conflict with Army Regulation 352-3 as applied to those unit employees.[13]

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[12] The Marine Corps has elected to have all employees at its Section 6 schools at Quantico, Virginia, including teachers, governed by leave regulations and laws applicable to other federal employees, rather than by leave practices in local public schools. MARINE CORPS DEVELOPMENT AND COMBAT COMMAND ORDER P1755.1A, § 501.1(h)(1), reproduced as addendum F to the Association's brief in the court of appeals.

[13] There is no indication in the record or in reported case law how the Army determines the salaries of paraprofessional teacher assistants. The Army has made no specific claim during the proceedings below that these employees' salaries are based on practices in local school districts.

Besides the fact that the Army freely disregards its own regulation in setting the salaries of many unit employees, there is no compelling need for the regulation as applied to teachers for the following reasons:

A. Section 241(a) Does Not Either Explicitly or Implicitly Require That Salaries for Section 6 School Teachers Be Identical to Those Paid to Teachers in Local Public Schools

1. Although § 241(a) requires, to the maximum extent practicable, that the Army provide its students with an education comparable to that provided in the neighboring communities, there is nothing in the plain language of Section 6 that requires pay or leave comparability, except for schools outside the continental United States, Alaska, and Hawaii. The central purpose of § 241(a) is to provide quality education in Section 6 schools, rather than to establish conditions of employment. *Antilles Council of School Officers, Local 68, American Federation of School Administrators, AFL-CIO v. Lehman*, 550 F.Supp. 1238, 1244 (D.P.R. 1982). The only language concerning compensation or leave practices in § 241(a) states that personnel *may* be employed in Section 6 schools without regard to the pay and leave statutes applicable to most other Federal employees. Other than this broad grant of discretion, § 241(a) is silent on what the pay or leave practices should be. "Legislative silence is a poor beacon to follow in discerning the proper statutory route." *Zuber v. Allen*, 396 U.S. 168, 185 (1969).

It is clear from a reading of the whole of § 241(a) that the Army and other agencies are given broad discretion to set salaries in schools within the continental United States, Alaska, and Hawaii. The third sentence of § 241(a), quoted above, sets a comparability standard for quality of education by mandating that education in Section 6 schools be comparable to public education in "comparable communities in the State," or, in the case of Section 6 schools outside the continental United States,

Alaska, and Hawaii, comparable to public education in the District of Columbia. The fifth, or next-to-last, sentence of § 241(a) reads:

> Personnel provided for under this subsection outside of the continental United States, Alaska and Hawaii, shall receive such compensation, tenure, leave, hours of work, and other incidents of employment on the same basis as provided for similar positions in the public schools of the District of Columbia.

If "comparable salaries" were part and parcel of, and required by the language mandating comparable quality of education, this fifth sentence of § 241(a) would be unnecessary. However, a statute should not be construed in such a way as to render any provision surplusage. *State of New York v. Shore Realty Corp.*, 759 F.2d 1032, 1044 (2nd Cir. 1985); *Pacific Mutual Life Insurance Co. v. American Guaranty Life Insurance Co.*, 722 F.2d 1498, 1500 (9th Cir. 1984); *National Insulation Transportation Committee v. ICC*, 683 F.2d 533, 537 (D.C. Cir. 1982); *United States v. Wang Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972). The fact that a specific pay comparability clause was included for some Section 6 schools but not for others should not be dismissed as fortuitous. When Congress includes particular language in one section of a statute but omits it in another section of the same act, it is generally presumed that Congress acted intentionally and purposefully in the disparate inclusion or exclusion. *Rodriguez v. U.S.*, 480 U.S. 522, 525 (1987); *Russello v. U.S.*, 464 U.S. 16, 23 (1983). Clear use of different terminology within the body of legislation is evidence of intentional differentiation. *Tafoya v. U.S. Dept. of Justice, Law Enforcement Assistance Administration*, 748 F.2d 1389, 1391-2 (10th Cir. 1984); *Lankford v. Law Enforcement Assistance Administration*, 620 F.2d 35, 36 (4th Cir. 1980). When there is an absence of qualifying language in one section of a statute while other sections contain qualifying language, there is a clear implication that Congress intended the unqualified section to have

broad application. *United States v. Dangdee*, 616 F.2d 1118, 1119-20 (9th Cir. 1980).

2. A study of the evolving language of and amendments made to the original Section 6 also demonstrates that "comparable education" was not intended to be synonymous with or to require identical salaries. In fact, the original language of § 241(a) had to be amended to provide the Army with the *discretion* it now has to pay Section 6 teachers salaries comparable to those in neighboring school districts.

The original language of Section 6 was terse but contained the language that required "comparable education" —the language that the Army claims requires it to pay "comparable salaries." Section 6 of Pub. L. No. 81-874, 64 Stat. 1107, enacted on September 30, 1950, reads in its entirety:

> In the case of children who reside on Federal property—
>
> (1) if no tax revenues of the State or any political subdivision thereof may be expended for the free public education of such children; or
>
> (2) if it is the judgment of the Commissioner [of Education], after he has consulted with the appropriate State educational agency, that no local educational agency is able to provide suitable free public education for such children,
>
> the Commissioner shall make such arrangements (other than arrangements with respect to the acquisition of land, the erection of facilities, interest, or debt service) as may be necessary to provide free public education for such children. To the maximum extent practicable, such education shall be comparable to free public education provided for children in comparable communities in the State.

In 1953 the Act of September 30, 1950, was extended for two more years, and Section 6 of the Act was amended by

requiring that education provided to children outside the continental United States, Alaska, and Hawaii be "comparable to free public education provided for the children in the District of Columbia." A third sentence was added that provided that the agency with whom the Commissioner had arranged to provide such education "may" employ personnel "without regard to the civil service or classification laws." Act of August 8, 1953, ch. 402, § 8, Pub. L. No. 83-248, § 8, 67 Stat. 535 (1953). However, no language was added at the time that exempted Section 6 school personnel from the coverage of other personnel laws that were applicable to Federal employees.

In 1959 a dispute arose between the Department of the Army and the Comptroller General of the United States because the Army sought to establish compensation and leave practices in Section 6 schools that were similar to those in neighboring school districts but that were inconsistent with the Federal Employees Pay Act of 1945 and the Annual and Sick Leave Act of 1951, which were applicable to Federal employees.

On May 15, 1959, the Comptroller General issued decision No. B-138773, which held that the Department of the Army was *not* authorized pursuant to Pub. L. No. 81-874 or the 1953 amendment to Section 6 to compensate teachers at the Section 6 schools of the United States Military Academy, West Point, on the same basis as teachers in the neighboring city of Newburgh, New York, were compensated.[14] In response to a request from the Army for authorization to establish compensation and leave practices at West Point comparable to those in Newburgh, New York, the Comptroller General wrote to the Secretary of the Army in relevant part:

> Your request [to compensate teachers at West Point on the same basis as teachers in Newburgh, New York] appears to be based on implied authority thought to be contained in Section 6 of Public Law 874 and express authority appearing in section 8(b) of Public Law 248.
>
> Section 8(b) of Public Law 248, approved August 8, 1953, amends the earlier statute to provide in pertinent part as follows:
>
> > ". . . For the purpose of providing such comparable education, personnel may be employed without regard to the civil-service or classification laws."
>
> That language has not been construed as exempting employees from other statutes pertaining to Government employment. As pointed out above, some provisions of the Federal Employees Pay Act of 1945, as amended, still would be applicable as would the Uniform Annual and Sick Leave Act of 1951, the Veterans Preference Act and certain other statutes. Some of these would not be compatible with the objectives outlined in the Deputy Assistant Secretary's letter.
>
> We are aware of no way, other than by legislative means, of waiving the application of those statutes to Government employees.

In 1965 Congress finally gave the military departments the authority to establish, in their discretion, compensation and leave practices in Section 6 schools that were comparable to those in the neighboring communities. The Act of July 21, 19[illegible], § 2, Pub. L. No. 89-77, § 2, 79 Stat. 243 (1965) amended the fourth sentence of 20 U.S.C. § 241(a) to read:

> For the purpose of providing such comparable education, personnel may be employed and the compensation, tenure, leave, hours of work, and other incidents of the employment relationship *may* be fixed without regard to the Civil Service Act and rules (5 U.S.C. § 631 *et seq.*) and the following: (1) the Classification Act of 1949, as amended (5 U.S.C. 1071 *et seq.*);

[14] A copy of this decision is reproduced in the addendum to this brief.

> (2) the Annual and Sick Leave Act of 1951, as amended (5 U.S.C. 2061 *et seq.*); (3) the Federal Employees' Pay Act of 1945, as amended (5 U.S.C. 901 *et seq.*); (4) the Veterans' Preference Act of 1944, as amended (5 U.S.C. 851 *et seq.*); and (5) the Performance Rating Act of 1950, as amended (5 U.S.C. 2001 *et seq.*)

(emphasis added).

It is most important to note, as the Comptroller General found, that until this 1965 amendment the military departments did not have the authority to establish compensation and leave practices that varied from those of other Federal employers.[18] Since the law required comparable education for fifteen years without even the authority to establish comparable pay, the language that requires that the quality of education in Section 6 schools be comparable to that in local public schools obviously does not require comparable salaries.

Furthermore, there is nothing in the 1965 amendment that *requires* the military departments to establish compensation and leave practices similar to those in neighboring public schools. The amendment merely states that pay rates *may* be established without regard for the laws that mandate pay for other Federal employees. The authority to negotiate over compensation flows from this discretion.

Since the 1965 amendment, the Army has freely exercised its discretion to pay Section 6 personnel without regard to local practice. Effective July 1, 1969, the Fort Rucker Elementary School Board adopted a policy of having all clerical, janitorial, and other nonteaching positions classified and equated to comparable civil service positions. Under this policy, the Army paid those Section 6 school

[18] The Comptroller General has "a tradition of care and objectivity, including freedom from prior involvement in the matter at hand" and therefore his decisions should be used by the Court as "additional guidance in resolving the issues before it." *M. Steinthal & Co. v. Seamans*, 455 F.2d 1289, 1298 (D.C. Cir. 1971).

personnel on the same basis as equivalent Federal General Schedule and Wage Board employees, including equivalent cost-of-living and salary step increases authorized for other civil service employees. This practice was followed continuously until April 1974, when a pay raise for all Federal employees was not extended to these Section 6 employees by the Army. In 1978 the Fort Rucker School Board passed a resolution that the affected employees be granted retroactive pay increases that were given to other Federal employees. The Finance and Accounting Officer at Fort Rucker sought a Comptroller General ruling on the propriety of such a retroactive pay raise.

In the Matter of Fort Rucker Elementary School Employees, 58 COMP. GEN. 430 (1979), the Comptroller General approved the retroactive salary increases because he found that with the discretion to exempt Section 6 personnel from Federal pay laws came the discretion to extend the coverage of Federal pay laws to Section 6 personnel if the Army so desired:

> This Office has consistently held that "Section 6" school employees are subject to all statutes pertaining to Government employment except those for which exemption is expressly authorized. . . . Moreover, we recognize that the exempted provisions of Title 5 *may be extended* to "Section 6" school employees by operation of administrative directives and contract clauses.

58 COMP. GEN. at 434. (emphasis added). Thus, the Comptroller General has ruled that § 241(a) does not require that compensation practices be comparable to local public schools because the military departments retain the authority to continue to set salaries in accordance with pay practices applicable to other Federal employees. The Army's pay practices at Fort Rucker from 1969 until at least 1978 demonstrate that this, too, has been the Army's long-standing interpretation of § 241(a), which was only abandoned when the negotiability dispute at Fort Stewart and several other Section 6 schools arose.

In his *Fort Rucker* decision, the Comptroller General examined the legislative history of the 1965 amendment and determined that Congress gave the military departments the authority to exempt Section 6 personnel from Federal pay and leave statutes, not out of any concern that the practices be comparable to public schools in surrounding communities but because the application of certain Federal personnel laws was impracticable in the teaching profession. The Comptroller General wrote that the 1965 amendment "was intended to apply primarily to members of the teaching profession, in recognition of the fact that instruction schedules do not coincide with civil service work-hour and leave policies." 58 COMP. GEN. at 433. The Senate Report that accompanied the 1965 amendment contains a letter from the Secretary of the Army. This letter recommended that § 241(a) be amended, not to allow the Army to make compensation and leave practices comparable to those of local school districts, but to allow the Army to make such practices comparable to the profession as a whole. The Secretary explained several problems that were encountered because it was impractical to apply Federal personnel laws to the instructional schedules in the teaching profession, including the following:

> (a) Salary schedules are set up on the basis of a school year consisting of 9 or 10 months. The Federal Employees Pay Act of 1945, as amended, (5 U.S.C. 944(c)(1)) requires computation on a calendar year basis.
>
> (b) Hours of work are established on the length of the school day plus time required to direct extracurricular activities, as opposed to the 40-hour week requirement of the Federal Employees Pay Act of 1945. . . .
>
> (c) No provision is made for overtime pay since teachers are expected to devote whatever time is necessary to preparation for class sessions, grading of papers, and other customary curricular and extracurricular activities.

1965 U.S. CODE CONG. & AD. NEWS 1913. The Secretary of the Army also wrote that:

> Based upon the Department's experience in operating section 6 schools, it is highly desirable that the personnel practices for instructional personnel be patterned after those usually encountered in the teaching profession rather than those which have been developed for the Federal Service as a whole.

Id. Thus it is clear that the intent of the 1965 amendment was to *allow* the military departments to establish pay and personnel policies "patterned after those usually encountered in the teaching profession"[9] rather than to *require* that teachers be compensated at the same rates paid to teachers in neighboring public schools.[10]

Finally, although Congress amended Section 6 in 1953 to require that education in Section 6 schools outside the continental United States, Alaska, and Hawaii be comparable to the education provided in District of Columbia public schools, it was not until 1978 that Congress amended Section 6 to specifically require that compensation and leave in those schools be comparable to that in the D.C. schools. Act of November 1, 1978, Pub. L. No. 95-561, Title X, § 1009, 92 Stat. 2309 (1978). The 1978 amendment would never have been enacted if pay comparability was required by educational comparability. According to accepted norms of statutory construction, when Congress enacts an amendment, it is presumed to intend a change in legal rights. *Argosy Ltd. v. Hennigan*, 404 F.2d 14, 20 (5th Cir. 1968); *Wolf v. J.I.*

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[10] Congress also exempted teachers in DOD's overseas dependents schools from the coverage of certain pay and personnel laws applicable to other federal employees by enacting the Overseas Teachers Pay and Personnel Practices Act, 20 U.S.C. § 901 *et seq.*, for the identical reasons. *March v. U.S.*, 506 F.2d 1306, 1311 (D.C. Cir. 1974).

Case Co., 617 F.Supp. 858, 865 (D. Wis. 1985). There is a presumption that, by enacting a statute, the legislature intends to effect some change in existing law. *Kaup v. Western Casualty & Surety Co.*, 432 F.Supp. 922, 925 (D. Mont. 1977).

3. The Army incorrectly argues that higher salaries at Fort Stewart will undermine the objective of Section 6 because they will somehow burden local school districts. Pet. Br. 34 n.34. Section 6 was added to Pub. L. No. 81-874 not because of the adverse impact that Federal activities had on local communities but to remedy the adverse impact of local communities' policies on the effectiveness of Federal activities. Accordingly, negotiating compensation at Section 6 schools will not interfere with any Congressional goals.

Section 6 was not originally enacted to relieve any burden on local school districts. It was enacted because some local school districts would not cooperate with Federal agencies in operating public schools on Federal installations or allowing children who live on Federal installations to attend public schools. At the time Pub. L. No. 81-874 was enacted, the Army was already operating one school at Fort Benning and two schools at Fort Knox because Georgia and Kentucky authorities would not permit state funds to be used to provide schooling on Federal property. *See Hearings on H.R. 4115 Before the Special Investigating Subcomm. of the House Comm. on Education and Labor*, 81st Cong., 1st Sess. (1949), pp. 11, 13.

Pub. L. No. 81-874 came up for renewal and amendment in 1953. The legislative history clearly indicates why Congress gave the Commissioner of Education the authority to make arrangements with other agencies to operate schools for children who reside on Federal property when, in the Commissioner's judgment, "no local educational agency is able to provide suitable free public education for such children." Section 6 schools were created not because Congress wanted to relieve a burden that may be placed on school districts adjacent to Federal installations but because *many of those neighboring school districts were racially segregated.* During his testimony before a subcommittee of the House Committee on Education and Labor, Acting Commissioner of Education Rall Grigsby stated that Section 6 was being used as authority by the U.S. Office of Education to make arrangements with the military departments to operate schools on military installations when local educational authorities would not provide education to military dependents on an integrated basis. *Hearings Pursuant to H.Res. 115 Before the Special Subcomm. of the House Comm. on Education and Labor*, 83rd Cong., 1st Sess. (1953), pp. 127-130.

The authority to operate Section 6 schools was expanded in 1960 because of local communities' efforts to fight school desegregation. As originally enacted, authority to operate Section 6 schools was reserved "for children who reside on Federal property." Pub. L. No. 81-874, § 6, 64 Stat. 1107. However, the Civil Rights Act of 1960, Pub. L. No. 86-449, Title V, § 501, 74 Stat. 909 (1960), expanded the authority of the Commissioner of Education and the military departments by authorizing the creation of Section 6 schools for military dependents who lived off base when public schools were closed by local authorities in order to avoid Federal court desegregation orders. This amendment reads:

> Such arrangements to provide free public education may also be made for children of members of the Armed Forces on active duty, if the schools in which free public education is usually provided for such children are made unavailable to them as a result of official action by State or local governmental authority. . . . .

The House Report that accompanied the Civil Rights Act of 1960 described the nature of the problem and why Section 6 was being amended. The House Report in-

cluded a letter from the Secretary of the Department of Health, Education, and Welfare, which read in part:

> When the public schools in a Federally affected area are closed as the result of State or local attempts to avoid compliance with Federal court decisions or decrees requiring desegregation, children of military personnel, like other children in the community, are deprived of their education. The Federal Government has a particular responsibility for the large numbers of children of military personnel in such Federally affected areas, since armed services personnel are located there under military orders rather than by their own free choice. Under the present law, the Commissioner of Education may provide for the education of children of military personnel only in the case of those who live on military reservations or other Federal properties.
>
> The proposed bill would amend the present laws to enable the Commissioner and the armed services concerned to provide for the education of children of military personnel, regardless of where they live, when the public schools are closed to them.

1960 U.S. CODE CONG. & AD. NEWS 1950. The House Report also reported that the education of 2,500 dependents of military personnel on active duty in Norfolk, Virginia, was recently interrupted when that city closed its public secondary schools to avoid a desegregation order. The House Judiciary Committee also estimated that "the proposed legislation could possibly affect the education of some 70,000 children of military personnel situated in states where the closure of schools is a possibility." *Id.* at 1946.

Although Congress enacted the other provisions of Pub. L. No. 81-874 in order to financially aid school districts impacted by the presence of a Federal activity, Congress expressed no concern for local school districts when it enacted, and subsequently amended, Section 6. The

Army's arguments are an attempt to rewrite history—a history of which it should be proud because the Army Section 6 schools were created as part of the Federal government's efforts to desegregate public education. Even if "comparable education" is construed to entail "comparable compensation," Section 6 does not prohibit the Army or other agencies from providing education in its schools that is *superior* to that provided in the neighboring communities. Congress was only concerned about the welfare of military dependents when it enacted Section 6, and no legitimate purpose would be served to construe Section 6 as a limit on the caliber of education that military dependents are provided, rather than as a guarantee that military dependents are not disadvantaged because they are being educated on base.

Finally, in practical terms, an increase in the pay of teachers at the Fort Stewart schools will not have any negative effect on the financial burden of the surrounding school districts. There are over two thousand teachers employed in the public schools of the five counties that are adjacent to Fort Stewart.[17] However, there are only 114 teachers in the bargaining unit at the Fort Stewart schools. There are simply too few vacancies at Fort Stewart to entice teachers away from the local public school districts in numbers significant enough to force the local school districts to raise salaries in order to retain their personnel. Furthermore, less experienced teachers will not move from local school districts to the Fort Stewart schools because of modest salary differences because they will sacrifice the retirement benefits that have been contributed on their behalf to the Georgia State

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[17] Chatam County (1339); Bryan County (186); Liberty County (385); Tatnall County (182); Long County (57). PUBLIC INFORMATION & PUBLICATIONS DIVISION, OFFICE OF DEPARTMENT MANAGEMENT, GEORGIA DEPT. OF EDUCATION, 1988 DIRECTORY OF GEORGIA PUBLIC EDUCATION—STATE AND LOCAL SCHOOL STAFF, 52, 61-63, 136-137, 168 (1987).

Teacher Retirement System. Those benefits do not vest for ten years. GA. CODE ANN. § 47-3-101. Experienced teachers will not be enticed away from the Georgia public school system solely for a salary increase because the benefits of the Georgia teacher retirement program cannot be fully realized until the teacher completes thirty years' service. *Id.*

B. The Army Has Failed to Demonstrate That § 241e Requires Identical Salary Schedules

Title 20 U.S.C. § 241(e) only requires that the per-pupil costs at Section 6 schools not exceed those in comparable local schools "to the maximum extent practicable." It does not require that salary compensation costs be equal. Assuming that it is not practicable to offset the increased cost of teachers' salaries by other economies in the schools' overall program (and certainly economies can be found in any government program), the Army may exceed per-pupil costs without offending § 241(e) because it is not "practicable" to equalize them *and* meet the bargaining obligations imposed upon the Army by the FSLMR Statute at the same time. Both Section 6 and the FSLMR Statute are acts of Congress advancing important social welfare goals, and both are equally important. The Army's obligations under one law must be balanced with its obligations under the other. Under the FSLMR Statute, the Army *must* bargain over conditions of employment, but under § 241(e) the Army must equalize per-pupil expenditures only if it is "practicable" to do so.

According to a Government Accounting Office study, the Army freely disregards the § 241(e) command to limit the total per-pupil expenditures at its Section 6 schools to those in comparable local school districts. During the 1983-84 school year, the per-pupil expenditures at Fort Stewart were $2,400 compared with $1,448 at adjacent Liberty County. GOVERNMENT ACCOUNTING OFFICE, DOD SCHOOLS—FUNDING AND OPERATING ALTERNATIVES FOR EDUCATION OF DEPENDENTS, 67 (December 1986). Per-pupil expendentures at Fort Benning were $2,636 compared with $2,071 in neighboring Chattahoochee County, Georgia, and $2,431 in neighboring Muscogee County. *Id.* at 66. The Fort Knox schools spent $3,538 per pupil, while neighboring Hardin and Mead Counties, Kentucky, spent $1,600 and $2,500 per pupil, respectively. *Id.* at 70. The Fort Campbell schools spent $2,585 per pupil compared with $1,648 in adjacent Christian County, Kentucky, and $1,671 in adjacent Clarksville-Montgomery County, Tennessee. *Id.* Per-pupil expenditures at Fort Jackson were $2,789 compared with $2,289 in neighboring Richland County, South Carolina. *Id.* at 81. It appears that the Army and the other military services long ago determined that it was not "practicable" to limit the per-pupil expenditures at its Section 6 schools to those in surrounding communities and still provide the quality of education that § 241(a) mandates.[18] Therefore, § 241(e) should not be used as an impediment to bargaining.

Identical salary schedules will not produce identical compensation costs or per-pupil expenditures. There are eighteen different steps on each of four different pay lanes on the current Fort Stewart teachers' salary schedule. A teacher's pay, depending on his or her terminal degree and years of experience, could range anywhere from $21,528 to $40,726. If the Fort Stewart salary schedule is identical to that in local public schools, the professional qualifications and number of years of experience possessed by both the teachers at Fort Stewart and those in the local school districts would also have to

[18] The per-pupil expenditures at the Section 6 schools at Maxwell Air Force Base, Robbins Air Force Base, and Myrtle Beach Air Force Base also dramatically exceed those in the surrounding communities. *Id.* at 63, 69, 83. The same is true at the Dahlgren, Virginia, Naval Surface Weapons Center and the Quantico Marine Corps Base. *Id.* at 84, 86.

be identical in order to produce identical compensation costs and per-pupil expenditures.

Even assuming that the salary costs at Fort Stewart and selected Georgia school districts are presently comparable, other significant portions of the teachers' total compensation package are already unequal. Teachers at Fort Stewart who were employed prior to December 31, 1983, are covered by the Federal Civil Service Retirement System, 5 U.S.C. § 8301 *et seq.* The Army contributes 7% of each employee's basic pay to the Civil Service Retirement Fund and nothing to the Social Security Fund. Georgia school districts adjacent to Fort Stewart contribute 13.65% of each teacher's salary rate to the Teacher Retirement System of Georgia. GA. ANN. CODE § 47-3-1 *et seq.*, plus 7.51% to the Social Security Fund. Assuming that salaries are currently equal, the Army must immediately raise the salary of teachers employed prior to 1984 *14.16%* to have the total compensation costs for those teachers equal the costs of similar teachers in Georgia public schools. Fort Stewart teachers are also covered by different health insurance programs (compare 5 U.S.C. §§ 8901 *et seq.* with GA. CODE ANN. § 20-2-880 *et seq.*), as well as different life insurance and disability programs. The claim that compensation costs are, and must remain, equal is a myth.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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December 15, 1989

ADDENDUM

ADDENDUM

[SEAL]

COMPTROLLER GENERAL
OF THE UNITED STATES

Washington 25

B-138773 May 15, 1959

Dear Mr. Secretary:

On February 12, 1959, your Deputy Assistant Secretary requested our decision concerning a proposal now under consideration by your Department to effect a change in the method of procuring teachers and other suitable personnel for the operation of the dependents' school at the United States Military Academy, West Point, New York.

At the present time all employees of the depedents' school at West Point are serving under Civil Service competitive appointments in positions subject to the Classification Act of 1949 (5 U.S.C. 1071), as amended. If and when the proposed change is effected, all new employees are to be given excepted appointments without specific time limitation. The positions of all employees are to be exempted from the Classification Act of 1949 (5 U.S.C. 1081), as amended, and salary rates are to be established, subject to the approval of the Commissioner of Education, Department of Health, Education, and Welfare, on the basis of rates of pay and conditions of employment prescribed for teachers in public school systems in the area—in this case the City of Newburgh, New York.

Your proposal to change the method of effecting employment by prescribing rates of pay and hours of duty for employees of the dependents' school is to conform with the authority provided in section 6 of the act of September 30, 1950, Public Law 874, 64 Stat. 1100, as amended (20 U.S.C. 237). Section 6 of that act author-

izes the Commissioner of Education to make arrangements for the provision of free public education for children residing on Federal property when no legal agency is able to provide suitable free public education for them. Specifically, your Department, on page 2 of the letter, requests our views as to whether the procedural changes hereinafter described, which are not fully in accord with Federal employment legislation—particularly the Federal Employees Pay Act of 1945, 59 Stat. 295, as amended, and the Annual and Sick Leave Act of 1951, 65 Stat. 679, as amended—properly may be effected.

The changes referred to are as follows:

"a. School-year salary schedules for teachers are established on a 10-month basis.

"b. Experience and training factors are considered in determining the salary rate payable upon initial employment.

"c. Fixed amounts are added to the yearly rate to recognize educational acquirements; for example, $300 is added to the yearly rate for persons having either an M.A. degree or a Bachelor's Degree plus 30 semester hours in approved courses.

"d. Fixed amounts are added to the yearly salary rate in payment for extra-curricular activities; for example, $100 is added to the yearly rate for each coaching assignment, limited to a total of $300 for all such activities.

"e. Salary schedules are reviewed annually and adjusted to reflect rates prevailing in the area.

"f. The occurrence of school holidays, such as Thanksgiving, Christmas and spring vacations, has no effect on the amount of salary payable for the period involved.

"g. Hours of work are determined by the duration of the school day plus time required to direct

extra-curricular activities, as distinguished from a regularly scheduled weekly tour consisting of a prescribed number of hours per day for a set number of days per week.

"h. Aside from the increased salary rate provided for extra-curricular activities (d above), no provision is made for overtime pay."

Your request appears to be based on implied authority thought to be contained in section 6 of Public Law 874 and express authority appearing in section 8(b) of Public Law 248.

Section 8(b) of Public Law 248, approved August 8, 1953, amends the earlier statute to provide in pertinent part as follows:

"* * * For the purpose of providing such comparable education, personnel may be employed without regard to the civil service or classification laws."

That language has not been construed as exempting employees from other statutes pertaining to Government employment. As pointed out above, some provisions of the Federal Employees Pay Act of 1945, as amended, still would be applicable as would be the Uniform Annual and Sick Leave Act of 1951; the Veterans Preference Act and certain other statutes. Some of these would not be compatible with the objectives outlined in the Deputy Assistant Secretary's letter.

We are aware of no way, other than by legislative means, of waiving the application of those statutes to Government employees. Thus, our answer to the specific question on page 2 of the letter must be in the negative.

Sincerely yours,

/s/ Joseph Campbell
Comptroller General
of the United States

The Honorable
The Secretary of the Army

No. 89-65

In the Supreme Court of the United States

OCTOBER TERM, 1989

FORT STEWART SCHOOLS, PETITIONER

v.

FEDERAL LABOR RELATIONS AUTHORITY AND
FORT STEWART ASSOCIATION OF EDUCATORS

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT FEDERAL LABOR RELATIONS AUTHORITY

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QUESTIONS PRESENTED

1. Whether compensation of federal employees whose rates of compensation are not specifically provided for by law is a negotiable "condition[] of employment" under 5 U.S.C. 7103(a)(14), which defines that term as "personnel policies, practices, and matters * * * affecting working conditions."

2. Whether bargaining proposals concerning employee pay and money-related fringe benefits interfere with a federal agency's management right to determine its budget under 5 U.S.C. 7106(a)(1) where the agency has not shown that the proposals entail significant and unavoidable costs, or that the proposals' costs are not offset by compensating benefits.

3. Whether a Department of the Army regulation requiring, to the extent practicable, equality of salary schedules of Army dependents school and local school employees is a nondiscretionary implementation of a mandate of 20 U.S.C. 241, so that the Army regulation is supported by a "compelling need" under 5 U.S.C. 7117(b) and can therefore bar negotiations on a proposal contrary to the regulation.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-30a) is reported at 860 F.2d 396. The decision of the Federal Labor Relations Authority (Pet. App. 31a-54a) is reported at 28 F.L.R.A. 547.

JURISDICTION

The judgment of the court of appeals was entered on November 21, 1988. A petition for rehearing was denied on February 17, 1989 (Pet. App. 55a-56a). On May 11, 1989, Justice Kennedy extended the time for filing a petition for a writ of certiorari to and including July 17, 1989. The petition for a writ of certiorari was filed on that date, and was granted on October 2, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(a).

STATUTES AND REGULATIONS INVOLVED

The relevant portions of the Federal Service Labor-Management Relations Statute, as amended, 5 U.S.C. 7101-7135; 20 U.S.C. 241; 5 C.F.R. 2424.11; and Army Reg. 352-3 are reproduced in the appendix to this brief (FLRA App. 1a-7a).

STATEMENT

A. Statutory Background

1. *The Federal Service Labor-Management Relations Statute*

Labor-management relations in the federal service are governed by the Federal Service Labor-Management Relations Statute (Statute), as amended, 5 U.S.C. 7101-7135. The Statute was enacted as Section 701 of the Civil Service Reform Act of 1978.[1] Under the Statute, the responsibilities of the Federal Labor Relations Authority (the Authority), a three-member independent and bipartisan body within the Executive Branch, include, among other things, adjudicating collective bargaining disputes and providing leadership in establishing policies and guidance relating to matters arising under the Statute. 5 U.S.C. 7104-7105. The Authority performs a role analogous to that of the National Labor Relations Board (NLRB) in the private sector. *Bureau of Alcohol, Tobacco and Firearms* v. *FLRA*, 464 U.S. 89, 92-93 (1983). Congress intended the Authority, like the NLRB, "to develop specialized expertise in its

[1] Pub. L. No. 95-454, 92 Stat. 1111 (1978). Prior to the enactment of the Statute, labor-management relations in the federal service were governed by a program established in 1962 by Exec. Order No. 10,988, 3 C.F.R. 521 (1959-1963 Comp.). The Executive Order program was revised and continued by Exec. Order No. 11,491, 3 C.F.R. 861 (1966-1970 Comp.), as amended by Exec. Orders 11,616, 11,636, and 11,838, 3 C.F.R. 605, 634, 957 (1971-1975 Comp.).

field of labor relations and to use that expertise to give content to the principles and goals set forth in the [Statute]." *Bureau of Alcohol, Tobacco and Firearms*, 464 U.S. at 97.

Under the Statute, a federal agency must bargain in good faith with exclusive bargaining representatives about unit employees' "conditions of employment." 5 U.S.C. 7103(a)(12). See also *Equal Employment Opportunity Comm'n* v. *FLRA*, 744 F.2d 842, 850 n.18 (D.C. Cir. 1984), cert. dismissed, 476 U.S. 19 (1986) ("conditions of employment" under Section 7103(a)(14) of the Statute to be construed broadly, to include the working situation and employment relations of bargaining unit employees). The term "conditions of employment" is defined as "personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions * * *" except to the extent, among other things, that a matter is "specifically provided for by Federal statute." 5 U.S.C. 7103(a)(14). However, there is no duty to bargain over contract language which would bring about an inconsistency with a federal law, government-wide rule or regulation, or an agency regulation for which a "compelling need" exists. 5 U.S.C. 7117(a); *FLRA* v. *Aberdeen Proving Ground, Dep't of the Army*, 108 S. Ct. 1261, 1262 (1988). Section 7117(a)(2) of the Statute directs the Authority to formulate criteria for when an agency regulation is supported by a compelling need. One such criterion, relevant here, is whether an agency regulation is a nondiscretionary implementation of a statutory mandate. 5 C.F.R. 2424.11.

The Statute also contains a management rights clause that removes the exercise of certain management authority from the scope of negotiations. 5 U.S.C. 7106. As here pertinent, the Statute reserves

as nonnegotiable, subject to subsection (b) of Section 7106, the authority of management "to determine the * * * budget." 5 U.S.C. 7106(a)(1).

Additionally, although strikes in the federal sector are forbidden under 5 U.S.C. 7116(b)(7), Congress established a Federal Service Impasses Panel (FSIP or Panel). The Panel is made up of at least seven presidential appointees, and is charged with the responsibility of settling bargaining impasses. Either party may request the Panel to conduct an inquiry into a bargaining impasse. If, after the Panel makes initial recommendations to the parties they still cannot reach a settlement, the Panel may take various actions, including "whatever action is necessary and not inconsistent with [the Statute] to resolve the impasse." 5 U.S.C. 7119(c)(5)(B)(iii). See generally 5 C.F.R. 2471.1 to 2471.12. When the Panel imposes a term on the parties it is "binding on such parties during the term of the agreement, unless the parties agree otherwise." 5 U.S.C. 7119(c)(5)(C).

In the instant case, the Authority adjudicated a dispute over whether collective bargaining proposals were within the duty to bargain established by the Statute. 5 U.S.C. 7105(a)(2)(E), 7117(c). Under the Statute, if a federal agency alleges that a bargaining proposal is outside the duty to bargain, the exclusive representative may appeal the agency's allegation of nonnegotiability to the Authority. 5 U.S.C. 7117(c). The Authority examines the disputed proposal based on the record presented to it by the parties. *National Federation of Federal Employees, Local 1167* v. *FLRA*, 681 F.2d 886, 891 (D.C. Cir. 1982). If the Authority finds the proposal within the duty to bargain, the Authority orders that the agency upon request, or as otherwise agreed to by the parties, bargain over the proposal. 5 C.F.R. 2424.10. The

bargaining obligation imposed by the Statute does not require the agency to agree to the proposal or to make a concession. 5 U.S.C. 7103(a)(12); *Dep't of Defense* v. *FLRA*, 659 F.2d 1140, 1147 (D.C. Cir. 1981), cert. denied, 455 U.S. 945 (1982).

2. *20 U.S.C. 241*

Title 20 U.S.C. 241 authorizes the operation by federal agencies of schools in the United States which provide a free public education for eligible dependent children of military and civilian personnel who reside on federal property. Section 241 derives from Section 6 of the Act of Sept. 30, 1950, Title I of ch. 1124, 64 Stat. 1107, accordingly dubbing these schools frequently as "Section 6 schools." For most federal employees Congress sets specific wage and salary scales and classifications. However, Congress has not established specific wage and salary scales for dependent school employees. Title 20 U.S.C. 241(a) provides that "personnel may be employed and the compensation, tenure, leave, hours of work and other incidents of the employment relationship *may be fixed without regard to the Civil Service Act and rules* * * *" and other specified portions of Title 5 of the U.S. Code (emphasis added).

Title 20 U.S.C. 241(a) also requires the dependents schools to ensure "to the maximum extent practicable" that education at its schools is "comparable to free public education provided for children in comparable communities in the State." Dependents schools must also comply with 20 U.S.C. 241(e), which provides that "to the maximum extent practicable" total payments for such education shall be limited to an amount per pupil that does not exceed the amount spent in comparable communities in the state where the dependents school is located.

B. Proceedings in the Present Case

1. *The Authority's Decision*

This case arose during the course of collective bargaining negotiations between the Fort Stewart (Georgia) Association of Educators ("FSAE" or "union") and the Fort Stewart Schools ("Schools" or "Army") (Pet. App. 2a). Fort Stewart Schools is one of the 18 dependents school systems established under 20 U.S.C. 241 (Pet. App. 2a). The union represents all professional and nonprofessional employees at the Schools (Pet. App. 2a).

During negotiations, the Schools objected to three bargaining proposals concerning salary and benefits presented by the union for bargaining (Pet. App. 2a).[2] The first proposal included sections which set mileage reimbursement, mandated certain insurance programs, and gave the union the right to review and comment on salary schedules (Pet. App. 31a-34a). The second proposal suggested a fixed salary increase of 13.5% for the teachers and other employees for the subsequent school year (Pet. App. 34a). The third proposal detailed various leave practices such as personal leave, sick leave, professional leave, maternity leave, and leave without pay (Pet. App. 48a-54a). The Authority concluded that most of proposal 1; all of proposal 2; and most of proposal 3 were within the agency's duty to bargain (Pet. App. 45a).

a. First, the Authority (Chairman Calhoun dissenting in part) determined that the agency had not supported its argument that the union's proposals do not concern conditions of employment (Pet. App. 35a). The Authority stated (Pet. App. 35a) that it

[2] The text of union proposals 1, 2, and 3 is appended to the certiorari petition (Pet. App. 31a-34a, 48a-54a) filed by the Schools in this case.

had consistently held that nothing in the Statute or its legislative history prevents bargaining over employee compensation insofar as (1) the matters proposed are not specifically provided for by law and are within the discretion of the agency; and (2) the proposals involved are not otherwise inconsistent with law, applicable Government-wide rule or regulation, or an agency regulation for which a compelling need exists. The Authority cited (Pet. App. 35a), in support of its decision, *American Federation of Government Employees, AFL-CIO, Local 1897 and Dep't of the Air Force, Eglin Air Force Base, Florida*, 24 F.L.R.A. 377 (1986) (*Eglin*) (Chairman Calhoun dissenting).[3]

The Authority stated that it had previously held that nothing in 20 U.S.C. 241 or its legislative history indicated that Congress intended to restrict an agency's discretion concerning the particular employment practices relating to compensation which could be adopted (Pet. App. 36a). The Authority cited (Pet. App. 36a), in support of its decision, *Fort Knox Teachers Ass'n and Fort Knox Dependent Schools*, 26 F.L.R.A. 934 (1987) (*Fort Knox Dependent Schools*) (Chairman Calhoun dissenting), petition for review

[3] In *Eglin*, the Authority's lead decision in this area, the Authority found negotiable a proposal that a Nonappropriated Fund Instrumentality (NAFI) absorb 75% of the cost of health insurance. Health insurance for NAFI employees is not governed by law. After surveying the general scheme for setting pay and fringe benefits for federal employees, the scope of bargaining under the Statute, and rulings by the Federal Labor Relations Council under E.O. 11,491, as amended, 3 C.F.R. 861 (1966-1970 Comp.) (24 F.L.R.A. at 378-381), the Authority concluded that Congress intended wages and fringe benefits to be considered the same for negotiability purposes as other conditions of employment under the Statute.

filed *sub nom. Fort Knox Dependent Schools* v. *FLRA*, Nos. 87-3593/87-3742 (6th Cir. June 25, 1987).

In *Fort Knox Dependent Schools*, 26 F.L.R.A. at 935-38, the Authority found a proposal concerning sabbatical leave, similar to a portion of proposal 3 here at issue, did not conflict with Section 241. The Authority in *Fort Knox Dependent Schools*, 26 F.L.R.A. at 937, rejected arguments that a proposal would conflict with the cost limitation provisions of 20 U.S.C. 241(e) simply by causing increased costs in a particular area of personnel compensation such as leave. Such an increase, the Authority held in *Fort Knox Dependent Schools*, 26 F.L.R.A. at 937, would not necessarily cause the agency to exceed the limitations on total per pupil cost of providing an education, noting that compensation is only one aspect of total cost.[4]

b. Second, the Authority in the instant case rejected the Army's claim that the proposals interfered with the Army's right to determine its budget under Section 7106(a)(1) of the Statute (Pet. App. 36a-37a). The Authority stated its long standing principle that in order to demonstrate that a union proposal directly interferes with management's right to determine its budget under Section 7106(a)(1), it is necessary for the agency either to show that the proposal prescribes the programs and operations to be included in the agency's budget or the amount to be allocated for them; or to make a substantial demonstration that the anticipated increase in costs is significant and unavoidable and is not offset by compensating benefits (Pet. App. 36a).

[4] The Authority in the instant case also noted (Pet. App. 36a) that regardless of the correctness of the Army's position on the negotiability of pay matters, sections A, C, and D of proposal 1 would be negotiable because they only involve union comments on pay data.

The Authority stated that the Army had not made a substantial demonstration that implementation of the proposals would result in a significant, unavoidable increase in costs not offset by compensating benefits (Pet. App. 37a). The Authority indicated that the record failed to show how many employees would actually be affected by the proposals, or the monetary increase which would be directly attributable to implementation of the proposals in the subject bargaining unit or in other bargaining units within the system (Pet. App. 37a).

The Authority also determined that the Army had failed to show that any increased costs occasioned by the proposals would not be offset by compensating benefits (Pet. App. 37a). Finally, the Authority noted that while the consequences of a proposal may be considered in the collective bargaining process, if concerns such as agency cost prevented the parties from reaching agreement, that consideration could be presented to the Federal Service Impasses Panel pursuant to Section 7119 of the Statute (Pet. App. 38a).

c. Finally, the Authority turned to the Army's assertion that the proposals conflict with the Army's regulation, AR 352-3, § 1-7, for which the Army alleged a "compelling need" exists (Pet. App. 40a-41a). The Authority pointed out (Pet. App. 40a-41a) that substantially the same argument was raised by a Section 6 school to support its claim that there was a compelling need for AR 352-3 in *Fort Knox Teachers Ass'n and Board of Education of the Fort Knox Dependents Schools*, 27 F.L.R.A. 203 (1987), petition for review filed *sub nom. Board of Education of the Fort Knox Dependents Schools* v. *FLRA*, Nos. 87-3702/87-3853 (6th Cir. July 24,

1987) (*Fort Knox Teachers Ass'n*). In that case the Authority found "nothing in either the law [Section 241] or its legislative history which persuades [the Authority] that Congress intended to restrict the Agency's discretion as to the particular employment practices which could be adopted" (Pet. App. 41a) (bracketed material added). *Fort Knox Teachers Ass'n*, 27 F.L.R.A. at 216. Consequently, the Authority held in the instant case that the agency failed to sustain its burden of showing a compelling need for the regulation (Pet. App. 41a). Moreover, the Authority stated in the instant case, even assuming the Army had supported its compelling need argument, the agency had not shown how several portions of proposal 1, which assume that pay rates will be fixed in accordance with pay practices in comparable school systems, conflicted with the Army's regulation (Pet. App. 41a).

2. *The Court of Appeals Decision*

Fort Stewart Schools petitioned the Eleventh Circuit to review the Authority's decision (Pet. App. 1a). A unanimous panel of the Eleventh Circuit affirmed and enforced the Authority's decision and order (Pet. App. 1a-30a).

a. First, the court of appeals determined that the Army had a statutory duty to bargain because the union's proposals involve "conditions of employment" within the Army's discretion to establish (Pet. App. 6a-17a). The court of appeals indicated that the Authority had determined in prior decisions that the Statute did not prohibit bargaining over compensation and fringe benefits when "Congress has not specifically provided for these matters; and the proposals do not conflict with law, government-wide rule or regulation, or an agency regulation for which a compelling need exists" (Pet. App. 7a; citation

omitted). The court of appeals determined that the Statute and its legislative history supported the Authority's conclusion (Pet. App. 7a). The court of appeals explained that the Statute's definition of "conditions of employment" does not exclude compensation and fringe benefits (Pet. App. 7a).

The court rejected the Army's argument that the definition of "conditions of employment" in the Statute encompasses a narrower range of bargainable matter than under Section 8(d) of the National Labor Relations Act (NLRA), 29 U.S.C. 158(d),[5] because the Statute does not specifically list wages and hours as bargainable matters (Pet. App. 8a). The court found that the absence of such terms did not prove Congress intended to exclude "wages" and "hours" from negotiation (Pet. App. 8a). Rather, the court explained that Congress' use of the word "other" in Section 8(d) shows that Congress considered wages and hours to be conditions of employment (Pet. App. 8a). In the Statute, the court stated, Congress simply used the general term "conditions of employment," which encompasses wages, to define the scope of negotiable matters (Pet. App. 8a).

The court also rejected the Army's argument that Section 704 of the Civil Service Reform Act of 1978, 5 U.S.C. 5343 note, indicates congressional intent against permitting bargaining on wages for federal employees not covered by a provision like Section 704 (Pet. App. 8a). That section authorizes certain groups of federal prevailing rate employees to negotiate on, among other things, pay matters. The court found that the legislative history of Section 704 indicates that the section was intended to continue an

[5] Section 8(d) of the NLRA states in relevant part that "wages, hours, and other terms and conditions of employment" are subject to bargaining in the private sector.

exclusion of certain employees from the Prevailing Rate Systems Act of 1972, Pub. L. No. 92-392, 86 Stat. 564 (codified at 5 U.S.C. 5341-5349), which Act would have made the employees' pay nonnegotiable by specifically providing for their pay in the absence of Section 704 (Pet. App. 8a-9a).

Turning to the legislative history of the Statute, the court agreed with the Authority and the Second Circuit in *West Point Elementary School Teachers Ass'n* v. *FLRA*, 855 F.2d 936, 939-40 (2d Cir. 1988) (*West Point*), that legislators' remarks during debate on the Statute concerning negotiation on wages reflected an intent to bar negotiation only insofar as wage matters were regulated by Congress in legislation (Pet. App. 9a-13a).

The court also agreed with the Authority and the Second Circuit that the proposals were not inconsistent with 20 U.S.C. 241 (Pet. App. 13a). The court determined that the language of Section 241 does not specifically provide for the wages of school employees; nor does that section require identical salaries between dependents schools and local schools (Pet. App. 13a-16a).

b. Next, the court concluded the Army had not established a compelling need for its regulation that mandates equality of compensation between employees in dependents and local schools (Pet. App. 17a-19a). The court agreed with the Authority and the Second Circuit that the Army regulation does not "implement a mandate to the Army since Section 241 does not require the Army to compensate its school employees according to local public school practices" (Pet. App. 18a). As the Second Circuit had concluded, 855 F.2d at 943, the court below determined that the regulation was not "essential" to the Army providing a comparable education at comparable cost (Pet. App. 18a). The court found that the Army

could achieve both of these goals notwithstanding large variations in the employees' wages because many expenses beyond their salaries enter into the calculation of per pupil expenditures (Pet. App. 18a-19a). Moreover, the court stated Section 241 requires equality only to the maximum extent possible, not exact equality (Pet. App. 19a).

c. Finally, the court agreed with and deferred to the Authority's conclusion that the union's proposals did not interfere with the Army's right to determine its own budget (Pet. App. 19a-20a), as had the Second Circuit concerning similar proposals in *West Point*, 855 F.2d at 943-44. The court agreed with the Authority that the Army had not demonstrated that the proposals would cause substantial and unavoidable cost increases (Pet. App. 20a). The Army did not specify any amount by which the proposed matters would increase its budget (Pet. App. 20a). Further, the court found that the Army did not establish that no compensating benefits would offset such costs even if its costs increased under the proposals (Pet. App. 20a).

SUMMARY OF ARGUMENT

1. The Statute establishes its scope of bargainable subjects by first identifying three broad classes of matters ("personnel policies," "practices," and "matters * * * affecting working conditions") comprising the substantive definition of "conditions of employment." 5 U.S.C. 7103(a)(14). Several specific exceptions, none of which involves pay, then remove certain matters from the definition. Congress intended one of these specific exceptions, matters "specifically provided for by Federal statute," to remove compensation from the definition of "conditions of employment" for the overwhelming majority of federal employees, as Congress sets specific pay rates and benefits for most employees. However,

for a relatively few federal employees like those in this case, whose compensation is not fixed by law, compensation is negotiable as a "condition[] of employment" because compensation fits within any one or all three of the broad classes of matters comprising the definition of that term.

The substantive definition of "conditions of employment" is thus far broader than just the physical aspects of the work place. To so limit the definition would render nonnegotiable many matters, like promotion procedures and disciplinary rules, that are firmly established as proper bargaining subjects under the Statute. Moreover, express identification of compensation as a bargainable matter in other laws in no way undermines the conclusion that compensation fits within the Statute's broad substantive definition of "conditions of employment." The Statute does not list any specific bargaining subjects; and these other laws generally identify wages as a particular category of "conditions of employment."

The Executive Orders governing federal sector labor relations before the Statute contained language concerning the scope of bargainable matters almost identical to Section 7103(a)(14). The principle that compensation is bargainable as a condition of employment unless it is set by law was expressly recognized under these Orders. Yet Congress, although clearly familiar with Executive Order practice, evidenced no dissatisfaction with that result. Remarks by some legislators in the Statute's legislative history that employee compensation would not be bargainable are not properly viewed as indicating an intent to make pay nonnegotiable *per se*. If that was congressional intent the language of the Statute should reflect it, but that is not the case. Instead, the Statute's language (Section 7103(a)(14)(C)) reflects what other remarks by legislators make clear: that compensation would be

withdrawn from the scope of bargainable matters only when Congress specifies compensation rates in law.

2. The Authority's test for determining when bargaining proposals involving monetary cost interfere with management's right to determine its budget under Section 7106(a)(1) fully protects management interests as intended by Congress under that right. In relevant part the test relieves management from bargaining if it can establish that the real cost impact of a proposal, after all its required outlays and benefits are considered, compels management to seek through the budget process more money to conduct a program than management has deemed necessary. Thus, the test recognizes that only those bargaining proposals involving cost that have the effect of requiring management to revise its budget needs should be barred from bargaining under the budget right. Mere cost of a proposal alone is an insufficient basis to find interference with the Statute's budget right.

The Schools in this case make no showing as to how much the subject proposals will cost, or how much those costs might be offset, if at all, by compensating benefits. Instead, they erroneously claim that the Authority injects itself into agency budget decisions. However, the Authority does not become involved in management decisionmaking protected by the budget right. The Authority properly inquires of an agency invoking the right whether a proposal would merely require the agency to redistribute existing funds within existing operations, or would compel the agency to obtain additional funds. Management is not exempt under the budget right from bargaining on union proposals simply because management wishes to spend existing funds to set conditions of employment that differ from the union's proposals. Moreover,

under the Schools' view the Authority would simply "rubber stamp" agency conclusions that proposals' costs are not offset by compensating benefits, a role obviously inappropriate to the Authority's responsibility to resolve negotiability disputes.

3. Under Authority rules promulgated at Congress' direction a "compelling need" exists for an agency regulation, enabling it to bar negotiation on inconsistent proposals, if among other things the regulation is a nondiscretionary implementation of a statutory mandate. 5 C.F.R. 2424.11(c). Army regulation 352-3, § 1-7, is not such a regulation. 20 U.S.C. 241 does not mandate the same compensation levels for Section 6 school employees as local school employees receive. Section 241 only requires the Schools as best they can to provide federal dependents with comparable education to local schools at the same cost as local schools. Accordingly, the Schools retain the discretion to set compensation as they wish, so long as the goals of Section 241 are met. The Army's regulation is thus an exercise of discretion, not statutory mandate.

ARGUMENT

I. COMPENSATION OF FEDERAL EMPLOYEES WHOSE RATES OF PAY AND BENEFITS ARE NOT PROVIDED FOR BY LAW IS A NEGOTIABLE "CONDITION[] OF EMPLOYMENT" UNDER 5 U.S.C. 7103(a)(14)

The Statute broadly defines "conditions of employment" subject to the bargaining obligation as "personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions." 5 U.S.C. 7103(a)(14); see also *Equal Employment Opportunity Comm'n* v. *FLRA*, 744 F.2d at 845; *Dep't of Defense* v. *FLRA*, 659 F.2d at 1143 n.2. As the court of appeals recognized

(Pet. App. 7a), "this definition alone does not exclude compensation and fringe benefits."

Rather, as the Schools recognize (Pet. Br. 6-7, 23) and the Authority has consistently acknowledged (see, *e.g.*, *Eglin*, 24 F.L.R.A. at 378), pay matters for most federal employees are removed from the substantive definition of "conditions of employment" by an exception which provides that the term does not include matters to the extent they are "specifically provided for by Federal statute." 5 U.S.C. 7103(a)(14)(C).[6]

The wages and fringe benefits of most federal employees are outside federal agencies' duty to bargain because they are "specifically provided for" in various statutes providing for pay and benefits. See, *e.g.*, 5 U.S.C. 5331 *et seq.* (the General Schedule establishing pay rates for most federal white-collar employees). However, the broad substantive definition of "conditions of employment" in itself encompasses matters relating to pay and fringe benefits for those few federal employees whose pay is determined in the agency's discretion rather than by law, such as the dependents schools employees in the instant case.[7] Compensation is clearly one of the con-

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[6] Other exceptions to the substantive definition are matters relating to the classification of positions and political activities. 5 U.S.C. 7103(a)(14)(B) and (A). Compensation matters are not an enumerated exception to the definition.

[7] Of the "forty-odd federal pay systems which are not entirely set by statute" referenced in *Dep't of Defense Dependents School* v. *FLRA*, 863 F.2d 988, 989 (D.C. Cir. 1988), reh'g en banc granted (Feb. 6, 1989), employees under only a few of those systems would be able to negotiate on compensation under the Authority's case law. Most of these forty pay systems contain specific standards to be met by agencies in setting pay, thus removing pay determinations from the scope of negotiable agency discretion. See, *e.g.*, *American*

ditions on which the employment relationship is based. Indeed, compensation matters are probably the single most significant factor in attracting and retaining qualified employees. This construction of the Statute is supported by the plain meaning of the Statute's definition of "conditions of employment," as well as the Statute's antecedents and its legislative history. Moreover, the Authority is entitled to considerable deference in its interpretation of the Statute which it administers. Cf. *Ford Motor Co.* v. *NLRB*, 441 U.S. 488, 497 (1979).

1. When, as in this case, Congress defines a term for use in a law, that definition is "official and authoritative evidence of legislative intent," and prevails over all other interpretive aids. 1A Sutherland, *Statutory Construction* § 27.02 (4th ed. 1985); *Walling* v. *Portland Terminal Co.*, 330 U.S. 148, 150-151 (1947). Accordingly, inquiry properly begins in this case with determining whether employee compensation is a "personnel polic[y]," "personnel practice[]," or "matter[] * * * affecting working conditions" under Section 7103(a)(14). If employee compensation can reasonably be said to fit under any one of these three categories, then the Authority and the court below are correct in their resolution of this issue.

Employee compensation manifestly fits within any one of these three categories of matters encompassing the statutory definition of "conditions of employment." Thus, the amount of pay and money-related fringe benefits an employer will provide to its em-

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***Federation of Government Employees and Dep't of Defense, Dep't of the Army and Air Force, Headquarters, Army and Air Force Exchange Service, Dallas, Texas*, 32 F.L.R.A. 591 (1988) (proposal to increase commission rates nonnegotiable for employees subject to the Prevailing Rate Systems Act).**

ployees for work performed certainly constitutes either a personnel policy or personnel practice, or both. *Roberts' Dictionary of Industrial Relations* 542 (3d ed. 1986) ("personnel policy" broadly defined as "[a]n organization's guiding principles with respect to employees," including "what actions are to be taken" by management as regards its employees).

At no point do the Schools deny that employee compensation is a personnel policy or personnel practice. Rather, their definitional argument focuses primarily on a portion of the definition, that is, whether compensation is a "matter * * * affecting working conditions," which they construe as involving only the physical surroundings of the work place (Pet. Br. 17).[8]

To begin with, the Schools' definitional argument suffers from an inconsistent premise. The Schools argue (Pet. Br. 17-20) that compensation *per se* is not included in the definition of "conditions of employment" as it is not a matter affecting working conditions. On the other hand, the Schools recognize (Pet. Br. 6, 23) that pay for most federal employees has been removed from the definition of "conditions of employment" by Section 7103(a)(14)(C), because for most employees pay is specifically provided for by law. However, Congress would not have needed the Section 7103(a)(14)(C) "specifically provided for" exclusion to make pay nonnegotiable if it thought that

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[8] Under a basic principle of statutory construction, the modifier "affecting working conditions" applies only to the immediate antecedent, "matters," in Section 7103(a)(14), not to "personnel policies" and "practices." *United States* v. *Ven-Fuel, Inc.*, 758 F.2d 741, 751 (1st Cir. 1985). The principle is especially appropriate here, since the open-ended term "matter" is in need of modification, while "personnel policies" and "practices" have independent meaning without the modifier.

pay matters were not within the broad substantive definition of "conditions of employment." The Schools' definitional argument therefore renders Section 7103(a)(14)(C) redundant as to pay matters, a result to be avoided. *United States* v. *Menasche*, 348 U.S. 528, 538-539 (1955).

The Schools' claim that compensation is not a "matter[] * * * affecting working conditions," because it does not concern the physical surroundings of the work place, is seriously flawed even without this contradictory premise. Pay certainly can affect working conditions. For example, various forms of pay, such as hazardous duty pay, incorporate compensation for unpleasant work surroundings. See, *e.g.*, Federal Personnel Manual, Supplement 532-1, Appendix J. Thus, management must trade off the amount it must pay to compensate employees for unpleasant work surroundings with the cost of eliminating the unpleasantness. If management must pay more to attract a qualified work force to endure unpleasant surroundings than it would to eliminate the unpleasant surroundings, presumably management would choose to eliminate the unpleasant surroundings as the most cost-effective measure.

Moreover, a construction of the term "conditions of employment" that is limited to the physical environment of the work place would drastically reduce the scope of bargaining under the Statute from what it currently is under established precedent. In *Equal Employment Opportunity Comm'n* v. *FLRA*, 744 F.2d at 850 n.18, the D.C. Circuit rejected the view that the phrase "conditions of employment" is to be viewed narrowly as encompassing only the physical surroundings of the work place. Rather, the court pointed out that it has consistently endorsed the Authority's "broad interpretation" of the phrase, to

include the working situation and employment relations of bargaining unit employees.

Matters not restricted to the physical conditions of the work environment have been found in a number of cases to be negotiable conditions of employment. *Dep't of Defense, Dep't of the Army* v. *FLRA*, 685 F.2d 641, 647 (D.C. Cir. 1982) (post exchange privileges are negotiable conditions of employment); *National Treasury Employees Union* v. *FLRA*, 793 F.2d 371 (D.C. Cir. 1986) (incentive pay is a proper subject for negotiations); *United States Naval Ordnance Station, Louisville, Kentucky* v. *FLRA*, 818 F.2d 545 (6th Cir. 1987) (reassignment among qualified employees by seniority is negotiable); *Dep't of the Air Force, U.S. Air Force Academy* v. *FLRA*, 717 F.2d 1314 (10th Cir. 1983) (stays of discipline until appeal process is over is negotiable).[9]

Perhaps recognizing that they cannot credibly contend that employee compensation fits none of the matters referenced in the Statute's definition of "conditions of employment," the Schools argue alternatively (Pet. Br. 17-20) that various other laws show that pay and fringe benefits are "terms," but not "conditions," of employment. This alternative argument is equally unavailing. Section 8(d) of the National Labor Relations Act (NLRA) provides for

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[9] While the specific question of whether the particular matter at issue was a condition of employment under Section 7103(a)(14) was not explicitly before the courts in all the cited cases, implicit in the determination that a matter is negotiable is that it concerns conditions of employment, since the obligation to bargain under the Statute extends only to conditions of employment. The D.C. Circuit cases cited in the text also call into question the validity of that court's holding in *Dep't of Defense Dependents Schools* v. *FLRA*, 863 F.2d 988 (D.C. Cir. 1988), reh'g granted en banc (Feb. 6, 1989), heavily relied on by the Schools (Pet. Br. 17).

collective bargaining over "wages, hours, and other terms and conditions of employment." 29 U.S.C. 158 (d). The Schools argue (Pet. Br. 17-18) that because the Statute does not include reference to "terms" of employment, it implies a narrower range of bargainable matters under the Statute. However, in correctly rejecting this argument, the court below stated (Pet. App. 8a) that by using the word "other" in Section 8(d), Congress included wages and hours in the general category of "conditions of employment." Thus, Section 8(d) of the NLRA expressly relates "wages" to "conditions of employment." [10]

The court below also properly rejected petitioner's argument (Pet. Br. 19) that Section 704 of the Statute supports the view that pay is a "term," not a "condition" of employment under Section 7103(a)(14). As the court below correctly found (Pet. App. 8a-9a), Section 704 clarifies and extends the exemption from the pay-setting mechanisms of the Prevailing Rate Systems Act of 1972, 5 U.S.C. 5341 *et seq.*, for employees who had negotiated wages prior to implementation of that Act. Because the Prevailing Rate Systems Act establishes detailed procedures for

[10] Research discloses no court or National Labor Relations Board decision in the 54-year history of the NLRA which parses the relevant phrase in Section 8(d) between "terms" and "conditions" of employment. More importantly, the NLRA itself gives evidence that Congress did not have such a fine distinction in mind for Section 8(d). In Section 9(a) of the NLRA, 29 U.S.C. 159(a), Congress sets forth the rights of certified exclusive representatives "for the purposes of collective bargaining in respect to *rates of pay, wages*, hours of employment, *or other conditions of employment.*" (Emphasis added). The absence of coupling "conditions of employment" with the word "terms" in Section 9(a), which coupling is so critical to the Schools' NLRA analysis, is telling evidence that Congress did not consider "terms" of employment to be a distinct concept from "conditions" of employment.

fixing the pay rates of federal blue-collar employees, Sections 7103(a)(14)(C) and 7117(a)(1) of the Statute would preclude pay bargaining by all employees covered by the Prevailing Rate Act in the absence of an exemption. Section 704 acts as that exemption from the Statute's limitation on bargaining over matters which are specifically provided for by federal statute or which are inconsistent with law.

As the Schools recognize (Pet. Br. 18 n.9), there are some statutes which use the phrase "wages" in reference to "terms and conditions of employment," and those which use "wages" only in reference to "other conditions of employment." [11] The existence of various methods of referring to conditions of employment lends greater significance to the fact that a determination of whether wages fit within the definition of "conditions of employment" in Section 7103(a)(14) should be made solely with reference to the statutory definition itself. As demonstrated above, this definition indicates that compensation for federal employees whose pay is not specifically provided for by federal statute is a "condition of employment" within the meaning of Section 7103(a)(14)(C).[12]

[11] Senior Executive Service Act, 5 U.S.C. 3131(1) (providing for "a compensation system, including salaries, benefits, and incentives, and for other conditions of employment"); 18 U.S.C. 3622(c)(1) (providing for "the rates of pay and other conditions of employment" of prisoners on work-release); 16 U.S.C. 1703(a)(3) (providing that the Secretary of Interior and the Secretary of Agriculture shall determine "rates of pay, hours and other conditions of employment").

[12] Contrary to the Schools' claim (Pet. Br. 19), Congress' omission of an express reference to pay as a negotiable matter under the Statute, as compared to express references to wages as a proper bargaining subject under, *e.g.*, the NLRA, is no reason to conclude that compensation is not a "condition of employment" under Section 7103(a)(14). As discussed

2. The principle applied here by the Authority, that a bargaining proposal concerning compensation is negotiable if compensation is not specifically provided for by statute and the proposal is not inconsistent with applicable law or rule, has been followed since the outset of the federal sector labor relations program.[13] The scope of bargainable subjects has

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at pp. 27-30, *infra*, Congress manifestly wanted to render pay nonnegotiable under the Statute for the vast majority of federal employees by continuing to set pay rates by law. Given this clear intent, it would have made little sense for Congress to specify pay as a bargainable matter in the substantive definition of "conditions of employment," and then except pay from that definition in Section 7103(a)(14)(C). This does not change the fact, however, that for those employees whose pay is not set by law, pay is a "condition of employment." Congress' express reference to pay in other bargaining laws is merely a product of the different groups of employees covered under those other laws and differing congressional purposes in delineating those employees' scope of bargaining.

[13] The Report accompanying Executive Order 10,988 indicated that "[a]s a general rule * * * it may be said that a negotiable matter must be within administrative discretion, that is, it must be within the authority of the manager who is negotiating, and permissible by applicable laws, executive orders, and Administration and agency policy." The task force that prepared the Report expressly noted that pay was among the personnel matters within the permissible scope of bargaining to the extent that such matters were within an employer agency's discretion. In this connection, the Report stated that "[s]pecific areas that might be included among subjects for * * * collective negotiations include the work environment, * * * and where permitted by law the implementation of policies relative to rates of pay * * *." 3 C.F.R. 521 (1959-1963 Comp.), *reprinted in* Subcommittee on Postal Personnel and Modernization of the House Committee on Post Office and Civil Service, 96th Cong., 1st Sess. ***Legislative History of the Federal Service Labor-Management Relations***

been defined in terms similar to Section 7103(a)(14) of the Statute since Executive Order 10,988. That Executive Order described the subjects within the scope of its bargaining obligation as "personnel policy and practice, and matters affecting working conditions." 3 C.F.R. 521 (1959-1963 Comp.).[14] Executive Order 11,491 established "personnel policies and practices and matters affecting working conditions" as the subjects within the scope of the parties' bargaining obligation. Exec. Order 11,491, Section 11(a), 3 C.F.R. 867 (1966-1970 Comp.).

The Authority's predecessor, the Federal Labor Relations Council (FLRC), which administered Executive Order 11,491, as amended, found that federal employees whose wages and fringe benefits were not specifically established by law could bargain over those wages and benefits if a proposal was not otherwise inconsistent with law or appropriate regulation. *Overseas Education Ass'n., Inc. and Dep't of Defense, Office of Dependents Schools*, 6 F.L.R.C. 231 (1978) (salary schedules, extra pay lanes and compensation for summer school teachers within the bargaining obligation); *United Fed'n of College Teachers, Local 1460 and United States Merchant Marine Academy,*

Statute, Title VII of the Civil Service Reform Act of 1978 at 1201 (Comm. Print No. 96-7) (*Leg. Hist.*).

[14] Contrary to the Schools' assertion (Pet. Br. 24 n.12), the Executive Orders did use the phrase "conditions of employment." In Executive Order 11,491 the findings state that the well-being of employees and efficient government administration are benefited by giving employees an opportunity to participate in formulating and implementing "personnel policies and practices affecting the conditions of their employment." Exec. Order 11,491, 3 C.F.R. 867 (1966-1970 Comp.). Executive Order 10,988 contains a similarly worded finding. Exec. Order 10,988, 3 C.F.R. 521 (1959-1963 Comp.).

1 F.L.R.C. 211, 212 (1972) (proposals concerning compensation for college faculty negotiable).

The court below properly weighed these FLRC decisions and gave due consideration to Section 7135(b) of the Statute.[15] As the court of appeals noted (Pet. App. 12a), Congress is properly held to have known of these FLRC decisions.[16] *Lorillard* v. *Pons*, 434 U.S. 575, 580-581 (1978) (when Congress adopts a new law incorporating sections of a prior law Congress is presumed to know the judicial and administrative interpretations given the prior law). At no point in debate on the Statute did Congress express disapproval of the FLRC's pay decisions. Thus, under Section 7135(b) Congress is properly held to have approved FLRC practice in this area for use under the Statute until changed by law or Authority decision.[17] *Bureau of Alcohol, Tobacco and Firearms*

[15] Section 7135(b) of the Statute provides that all policies and decisions issued under Executive Order 11,491 and its subsequent amendments are to continue in effect unless superseded by Congress or subsequent Authority decisions.

[16] Contrary to the Schools' speculation (Pet. Br. 25), while Congress did not specifically reference these particular FLRC cases in the legislative history of the Statute, Congress demonstrated a thorough knowledge of existing FLRC precedent in its discussions on the Statute. See, *e.g.*, 124 Cong. Rec. 29,187 (1978), *Leg. Hist.* 932-933 (Congressman Clay's references to various FLRC cases). This knowledge fully comports with the inclusion of a provision such as Section 7135(b).

[17] It would be incongruous to conclude, as the Schools urge in effect, that Congress intended to shrink the bargaining obligation under the Statute over what it had been under Executive Order 11,491. To the contrary, Congress generally intended the bargaining obligation under the Statute to be construed more broadly than it had been under the Order. *Library of Congress* v. *FLRA*, 699 F.2d 1280, 1285-86 (D.C. Cir. 1983).

v. *FLRA*, 464 U.S. at 103 n.13 (Executive Order policies concerning agency payment of travel and per diem expenses for union negotiators to continue under the Statute in the absence of indication in the Statute of congressional intent to change those policies).

3. The Authority's analysis of the Statute's legislative history as to pay bargaining, endorsed by the court below (Pet. App. 9a-12a), finds specific expression in the Statute's language and should therefore be adopted. That is, legislators' statements that pay bargaining would not be permitted under the Statute are properly understood as relating to Congress' intent in Section 7103(a)(14)(C) to "specifically provide[] for" pay by law for most federal employees while allowing bargaining over those matters within an agency's discretion. The Schools' view of the legislative history (Pet. Br. 20-22), that Congress intended to make pay a nonbargainable subject *per se*, finds no expression in the Statute's language and should be rejected as the inferior view.

Prior to congressional consideration of the bill which became the Statute, H.R. 11,280, 95th Cong., 2d Sess. (1978), a federal employee collective bargaining bill enumerating a variety of specific bargaining subjects, including pay practices, for all federal employees was introduced but not passed. H.R. 9094, 95th Cong., 1st Sess., *Leg. Hist.* 244. During consideration of H.R. 11,280 this portion of H.R. 9094 was reintroduced by Congressman Heftel but not adopted by the House Committee considering H.R. 11,280. Amendments to Committee Print, dated July 12, 1978 of Proposed New Title VII of H.R. 11,280, *Leg. Hist.* 1087-1088.[18]

[18] Rejection of these proposals does not signify congressional intent to make pay matters *per se* nonnegotiable, as the Schools claim (Pet. Br. 20-21). Many of the other matters

In contrast to H.R. 9094, the version of H.R. 11,280 eventually passed by the Congress contained a broad, generic definition of conditions of employment, and barred wage bargaining for most federal employees through incorporation of the proviso that matters "specifically provided for by Federal statute" were removed from conditions of employment. 5 U.S.C. 7103(a)(14)(C). It was clearly understood by the legislators that a major purpose of what is now Section 7103(a)(14)(C) was to bar wage bargaining for the overwhelming majority of federal employees.[19]

The comments from legislators (cited at Pet. Br. 20-22) that wages are not negotiable indicate that legislators "merely were assuring their peers that the [Statute] would not supplant specific laws which set wages and benefits" (Pet. App. 12a). On a number of occasions during debate on the Statute, key legislators indicated their understanding that pay would not be negotiable under the Statute because Congress would continue to set compensation matters for most employees through legislation.[20]

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listed in these rejected proposals, such as promotion procedures and safety matters, undeniably pertain to conditions of employment that are negotiable under the Statute. Accordingly, it cannot be asserted that rejection of H.R. 9094 signifies congressional intent to render these other matters nonnegotiable.

[19] 124 Cong. Rec. 29,174 (1978), *Leg. Hist.* 906 (statement of Rep. Collins) ("[t]he House committee bill * * * broadly defines scope of bargaining by saying that 'conditions of employment' excludes only matter relating to * * * those few specifically prescribed by law—for example, pay and benefits.").

[20] 124 Cong. Rec. 25,721 (1978), *Leg. Hist.* 855-56 (statement of Rep. Ford) ("no matters that are governed by statute (such as pay, money-related fringe benefits, retirement, and so forth) could be altered by negotiated agreement."); 124 Cong. Rec. 29,182 (1978), *Leg. Hist.* 923 (statement of Rep. Udall) ("All these major regulations about wages * * * will continue to be established by law through congressional action."); 124 Cong. Rec. 24,286 (1978), *Leg. Hist.* 839 (statement of Rep. Clay) ("* * * employees could bargain over everything except that which is prohibited by law—pay, money-related fringe benefits * * *."). See also, H.R. Rep. No. 1403, 95th Cong., 2d Sess. 12, 44, *Leg. Hist.* 682, 690.

However, the legislative history also indicates that Section 7103(a)(14)(C) was not intended to exclude from the definition of "conditions of employment" those subjects, such as compensation in this case, which Congress has *not* prescribed by law. Congressmen Clay and Ford, both key figures in enactment of the Statute, stated in floor debate that Section 7103(a)(14)(C) of the Statute would remove only matters "specifically" provided for by statute so that where, as in the instant case, the agency has discretion over a matter, Section 7103(a)(14)(C) would not preclude bargaining.[21]

If Congress really intended, as the Schools claim, to make pay *per se* a nonnegotiable subject, it is most curious that Congress inserted no language in the law itself to that effect. Instead Congress expressly stated

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[21] 124 Cong. Rec. 29,187 (1978), *Leg. Hist.* 933 (statement of Rep. Clay) ("where a statute merely vests authority over a particular subject with an agency official with the official given discretion in exercising that authority, the particular subject is not excluded by [Section 7103(a)(14)(C)] from the duty to bargain over conditions of employment."); 124 Cong. Rec. 29,119 (1978), *Leg. Hist.* 957 (statement of Rep. Ford) ("where a statute merely provides particular authority for an agency official (with that authority to be exercised at the official's discretion and in such manner as the official deems appropriate), that authority and its exercise are not included within the definition in section 7103(a)(14)[(C)] because it is not 'specifically provided for by Federal statute.'").

in relevant part that only those matters "specifically provided for by Federal statute" are outside the definition of conditions of employment. Congress' decision in the instant case to leave employee pay and benefits to the Schools' discretion thus supports the conclusion that it did not intend to withdraw the subject from bargaining under Section 7103(a)(14).

II. THE SCHOOLS HAVE NOT ESTABLISHED THAT THE UNION'S PROPOSALS VIOLATE MANAGEMENT'S RIGHT TO DETERMINE ITS BUDGET UNDER SECTION 7106(a)(1) OF THE STATUTE

Management's right to determine its budget under Section 7106(a)(1) of the Statute is undefined in the Statute and is not described in the Statute's legislative history. Accordingly, early on in its administration of the Statute the Authority devised a two-part test for determining whether a bargaining proposal interferes with this management right. *American Fed'n of Gov't Employees and Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio*, 2 F.L.R.A. 604 (1980) (*Wright-Patterson*), enf'd as to other matters *sub nom. Dep't of Defense* v. *FLRA*, 659 F.2d 1140 (D.C. Cir. 1981), cert. denied, 455 U.S. 945 (1982).[22]

For the first part of its budget test the Authority focused on the common or dictionary meaning of the term "budget," *i.e.*, a statement of the financial position of a body for a definite period of time based on

[22] In addition to the Second Circuit (see *West Point, supra*) and the court below, the D.C. Circuit has enforced Authority decisions applying this test. See, *e.g.*, *American Fed'n of Gov't Employees, Local 32 and Office of Personnel Management*, 22 F.L.R.A. 307 (1986), enforced *sub nom. OPM* v. *FLRA*, 829 F.2d 191 (1987). But see *Nuclear Regulatory Comm'n* v. *FLRA*, 879 F.2d 1225 (4th Cir. 1989), petitions for cert. pending, Nos. 89-198, 89-562.

detailed estimates of planned or expected expenditures during the period and proposals for financing them. 2 F.L.R.A. at 608. From this dictionary definition the Authority held that a proposal interferes with the budget right under Section 7106(a)(1) of the Statute if it attempts to prescribe a particular program or operation the agency would include in its budget, or the amount of money to be allocated in the budget for such program or operation. *Ibid.*

The Authority recognized, however, that bargaining proposals which on their face did not attempt to prescribe agency programs or dollar amounts to fund those programs could nonetheless interfere with management's budget right by entailing such substantial costs as to alter agency decisions concerning programs and their funding. Thus, the Authority devised the second part of its budget test. Under this second part an agency employer that makes a substantial showing that a proposal entails a significant and unavoidable cost that is not offset by compensating benefits can assert the budget right as a bar to negotiation on the proposal. 2 F.L.R.A. at 608. The Authority specified examples of such compensating benefits as improved employee performance, increased productivity, reduced turnover, and fewer grievances. *Ibid.*[23]

The Authority's approach under *Wright-Patterson* to implementing management's budget right, which approach recognizes both direct and indirect union efforts to become involved in the budget process, is

[23] The Schools do not argue to this Court that the union's proposals at issue here are nonnegotiable because the proposals fall under the first part of the *Wright-Patterson* test. Rather, the Schools' argument on the budget right (Pet. Br. 27-31) focuses exclusively on the second part of the test, concerning real cost impact of the proposals.

balanced and comprehensive. The test is thus a reasonable accommodation of conflicting policies under the Statute (*i.e.*, according proper scope to the collective bargaining process while preserving unilateral management action in designated areas), which test should not be disturbed because there is no indication that it is contrary to congressional will in enacting the Statute. *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Moreover, the Authority's *Wright-Patterson* test and its application in this case are entitled to deference from this Court because the test and its application constitute the Authority's exercise of "its 'special function of applying the general provisions of [the Statute] to the complexities' of federal labor relations." *Bureau of Alcohol, Tobacco and Firearms* v. *FLRA*, 464 U.S. 89, 97 (1983) (citation omitted); see also *West Point*, 855 F.2d at 944.

The Authority in this case made two holdings, affirmed by the court of appeals (Pet. App. 20a), concerning application of the second part of the *Wright-Patterson* budget test: first, that Fort Stewart Schools failed to establish a significant and unavoidable cost increase to the Schools caused by the proposals (Pet. App. 37a) [24]; and second, that the

[24] The only evidence submitted to the Authority by the Schools concerning significant and unavoidable cost increases caused by the proposals was that the seven other dependents schools with bargaining units, aside from Fort Stewart Schools, have more than 600 bargaining unit employees with total payroll costs of more than $11 million (Pet. App. 37a). The Schools claimed that if bargaining was permitted in this case, all other dependents schools bargaining units would want to bargain on these matters, thus occasioning substantial cost increases to the dependents schools as a whole. The Authority rejected this assertion (*ibid.*) because it did not pertain to costs engendered by the subject proposals in the bargaining unit here at issue. See, *e.g.*, *International Ass'n of Firefighters, Local F-61 and Philadelphia Naval Shipyard*, 3 F.L.R.A. 438, 452 (1980) (significance of cost of proposal covering 50 employees in a bargaining unit cannot be assessed on the premise that the proposal would apply to 10,000 employees of the agency similarly situated). The Schools do not renew this argument to the Court.

Schools failed to make any showing whatsoever that the proposals' costs, whatever they may be, were not offset by compensating benefits (Pet. App. 37a-38a). The record in this case fully supports these Authority holdings, and the Schools do not argue to the Court that they presented data to the Authority to support a different conclusion. Rather, the Schools assert (Pet. Br. 27-31) that the proposals, particularly Proposal 2 concerning a 13.5% pay increase for School employees (Pet. App. 34a), on their face indicate a significant cost increase to the Schools; and that the portion of the second part of the Authority's *Wright-Patterson* budget test concerning compensating benefits of a proposal offsetting cost is contrary to the Statute. The Schools' claims must be rejected, however, because the Authority's holdings as to the budget right are reasonable under the Statute and supported by the record before it.

1. Congress in the Statute assigned the Authority the task of resolving negotiability disputes in the federal sector. 5 U.S.C. 7105(a)(2)(E), 7117(c); see also, *Bureau of Alcohol, Tobacco and Firearms* v. *FLRA*, 464 U.S. at 93. In carrying out this responsibility the Authority must balance the Statute's competing interests of ensuring the proper scope of federal sector collective bargaining while allowing agency management to operate efficiently. *Bureau of Alcohol, Tobacco and Firearms* v. *FLRA*, 464 U.S. at 92; *Li-*

brary of Congress v. *FLRA*, 699 F.2d 1280, 1283 (D.C. Cir. 1983). As part of the Statute's negotiability dispute resolution process, the Authority properly requires agency management to support claims of nonnegotiability of a proposal with sufficient data to enable the Authority to adjudicate the claim. 5 U.S.C. 7117(c)(3)(B); *National Fed'n of Federal Employees, Local 1167* v. *FLRA*, 681 F.2d 886, 891 (D.C. Cir. 1982). Cf. *Royal Coach Lines, Inc.* v. *NLRB*, 838 F.2d 47 (2d Cir. 1988) (employer asserting no bargaining obligation with union has burden of producing evidence in support of that claim).

The agency's failure in this case to support its claim to the Authority of significant and unavoidable cost of the union's proposals is manifest. At no point has Fort Stewart Schools articulated the number of employees affected by the proposals; the current payroll costs of unit employees; the dollar amount of the cost increases anticipated by the proposals; total costs for operating the Schools; or any other data which would enable the Authority to assess the real cost impact of the proposals. Moreover, the agency has given no reason for failing to provide the data, even though it is presumably well situated to compile it. In the face of such a studied refusal to present relevant cost data, the Authority properly rejects an agency employer's claim of nonnegotiability based on the budget right. To hold otherwise would cause curtailment of the Statute's bargaining obligation without any clear basis.

The Schools' conclusory assertion (Pet. Br. 28-30), that a proposed 13.5% pay increase on its face is sufficient to establish a "significant and unavoidable" cost increase rising to the level of interference with the budget right under *Wright-Patterson*, falls short of the mark. First, the claim provides no basis for

concluding the proposals' costs are "significant." The union's proposals can only apply to bargaining unit personnel. Thus, school management and other categories of employees excluded from the bargaining unit (see 5 U.S.C. 7112(b)) would not be covered by the proposals. However, the Schools have provided no data as to the percentage of total staff in the bargaining unit. As a result, it is impossible to know the true impact of the proposals on the overall school budget. Also, while total school payroll may be a major component of overall school operating costs, there are obviously other substantial cost factors such as equipment and overhead. See W. Sparkman and B. Walker, *Education Reform and Changing Compensation Practices*, 14 Journal of Education Finance 76, 87 (1988) (teacher pay constituted approximately 58% of overall school budgets surveyed during the period 1979 to 1986). Again, however, the agency left the Authority in the dark as to this data. In sum, the Schools have provided no basis in the record of this case to conclude that the union's proposals will engender a significant cost increase.

Second, even assuming the proposals could be said to cause a significant cost increase, the Schools have provided no basis for concluding that the increase is unavoidable under *Wright-Patterson*. For example, any cost increases caused by the proposals may be avoided by cost savings in other areas, such as non-unit employee pay or equipment expenditures.[25] Again, the Schools' recalcitrance in addressing these issues made it impossible for the Authority to deter-

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[25] Presumably it is just this kind of balancing of costs that is undertaken by local schools in the 27 states where school employees can negotiate on pay. N. Davis, *Scope of Collective Bargaining in Public Education*, 36 Journal of Urban and Contemporary Law 107, 108 (1989).

mine whether the proposals actually require unavoidable costs. Having failed to make its case to the Authority concerning the proposals' significant and unavoidable costs, the Schools' argument was properly rejected by the Authority, as the court below recognized (Pet. App. 20a).

Finally, the Schools' claim (Pet. Br. 29-30), that the court below erred in assessing the proposals' costs against the budget for the Department of the Army as a whole, misapprehends the court's decision. The court of appeals affirmed (Pet. App. 20a) the Authority's rejection of the Schools' bald assertion that the proposals would cause significant and unavoidable costs. The Authority in its decision did not refer to the proposals' cost in relation to the overall Army budget.[26] The court of appeals' reference to the overall Army budget, which reference was prompted by a statement by the Schools to the court, was in addition to the court's basic holding affirming the Authority (Pet. App. 20a). Accordingly, the court of appeals ruling is correct and should be affirmed even in the absence of its reference to the Army's overall budget.[27]

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[26] In another case involving a dependents school's reliance on the budget right, the Authority assessed the significance of a proposal's cost in relation to the school's budget, as the Schools here claim is appropriate (Pet. Br. 29). *AFGE, Local 1770 and U.S. Dep't of Defense Dependent Schools, Ft. Bragg, North Carolina*, 25 F.L.R.A. 1132, 1137 (1987), petition for review dismissed as moot *sub nom. U.S. Dep't of Defense Dependent Schools, Ft. Bragg, North Carolina* v. *FLRA*, 838 F.2d 129 (4th Cir. 1988). See also *National Treasury Employees Union, Chapter 6 and Internal Revenue Service, New Orleans District*, 3 F.L.R.A. 747 (1980).

[27] The court of appeals' observation concerning the Army's budget is in any event consistent with the realities of the budget process for Section 6 dependents schools. Requested funds for these schools are included in a Department of Defense budget line in the President's annual budget request to the Congress which consists of expenses required for the operation and maintenance of all Department of Defense agencies other than the military departments. Budget of the United States Government, 1990-Appendix, 262-263 (1989). In the proposed 1990 budget, this item totaled over $7.6 billion of which approximately $1.1 billion was allocated to Department of Defense Schools (including overseas schools as well as Section 6 schools such as those at Fort Stewart). *Ibid.* Congress appropriates funds for the Schools as part of the line item in the Department of Defense Appropriations Act which include the same agencies as in that part of the President's budget request discussed above. See Department of Defense Appropriations Act, 1989, Title II, Operations and Maintenance, Defense Agencies, Pub. L. 100-463, 102 Stat. 2270, 2270-4 (1988). Congress appropriated $7.8 billion for these agencies for Fiscal Year 1990. Department of Defense Appropriations Act, 1990, Title II, Operations and Maintenance, Defense Agencies, Pub. L. 101-135 (Nov. 21, 1989). Thus, it is reasonable to conclude, as the court of appeals did, that the agency "budget" referenced in Section 7106(a)(1) of the Statute includes far more than merely the costs of operating the Fort Stewart Schools.

Securities and Exchange Comm'n v. *Chenery Corp.*, 318 U.S. 80, 88 (1943).

2. The "compensating benefits" portion of the Authority's budget test is a reasonable application of the budget right. Management's determination of its budget is, of course, functionally distinct from management's determination to incur costs, as even the Schools recognize (Pet. Br. 28). The former determination is protected from bargaining by a management right under the Statute while the latter determination is not. Thus, in devising a test for deciding when a bargaining proposal is so costly as to compel agency budget decisions, the Authority is properly mindful of the proposal's real cost impact on agency operations after compensating benefits are factored in. For it is only a proposal's real cost impact that

would affect agency budget decisions. To focus solely on a proposal's initial cost would essentially fabricate a management right under the Statute (*i.e.*, the right to determine what costs will be incurred by the agency) where none otherwise exists. Such a result is obviously to be avoided. *AFGE, Local 32* v. *FLRA*, 853 F.2d 986, 992 (D.C. Cir. 1988).

Moreover, and contrary to the Schools' claim (Pet. Br. 30), the "compensating benefits" showing an agency must make under the Authority's test to support an assertion of the budget right is reasonably placed on the agency employer. The cost/benefit analysis called for is a commonly used management planning device in both the private and public sectors. See, *e.g.*, Exec. Order 12,291, 3 C.F.R. 127 (1982) (federal agencies must perform cost/benefit analysis, including non-quantifiable costs and benefits, in determining whether to issue a major rule); P. Butler, *Employer-Sponsored Recreational Activities: Do the Costs Outweigh the Benefits?*, 39 Labor Law Journal 120 (1988). No reason appears why the Schools could not provide the Authority with analysis as to the benefits, if any, of the union's proposals in terms of higher employee productivity, reduced turnover, etc. The Schools' total failure even to attempt such a showing is sufficient reason for the Authority to have rejected its claim.[28]

The Authority acts consistently with the Statute in making a determination whether a proposal's initial cost is offset by compensating benefits. First, Con-

[28] The Schools are not alone in refusing to provide the Authority with data concerning compensating benefits of a proposal in connection with assertion of the budget right. In fact, no agency has ever provided the Authority with such data in a budget right case. Accordingly, the Authority has not issued a decision implementing the compensating benefits aspect of its budget test.

gress has appointed the Authority as the arbiter of which proposals interfere with management rights (see pp. 33-34, *supra*). To propose, as do the Schools (Pet. Br. 30-31), that the Authority is to accept without question an agency employer's assertion that a proposal's initial cost is not sufficiently compensated for by the proposal's benefits is to make the Authority a mere "rubber stamp" for agency assertions of nonnegotiability in the budget area. Congress clearly did not have this role in mind for the Authority under the Statute. For the Statute to work properly the Authority must retain its ability to make independent assessments of which proposals are so costly in real terms as to effectively interfere with the budget right. 124 Cong. Rec. 29,187 (1978), *Leg. Hist.* 933 (remarks of Congressman Clay that a key element of agreement on the management rights clause of Section 7106 of the Statute is the Authority's "conscientious scrutiny" of management claims of infringement on those rights).

Second, compensating benefits analysis does not inject the Authority into an agency employer's decision making process that is protected by management's budget right under the Statute. The essence of the budget right, as the Authority recognized in *Wright-Patterson*, 2 F.L.R.A. at 608, is to determine what programs the agency will conduct, and how much money it will spend in conducting those programs. *Webster's Third New International Dictionary* 290 (1986) (budget defined as "a statement of the financial position of a body for a definite period of time based on detailed estimates of planned or expected expenditures during the period and proposals for financing them"). If a union proposal concerns a condition of employment and does not have the effect of increasing the amount of money an agency needs to

request from Congress to conduct its operations, the budget right does not bar negotiations on the proposal.

Thus, the Schools are incorrect in arguing (Pet. Br. 31) that the budget right enables management to decide, for example, to pay employees low wages and suffer high turnover costs and low productivity, even though a union proposal for higher wages would result in no real cost impact to agency operations because the proposal reduces turnover and increases productivity. The Statute allows employees to seek to improve their work lives through collective bargaining in such a situation. In short, the Authority's compensating benefits analysis is designed to do nothing more than allow bargaining to take place where the agency cannot show that the proposal would disturb an agency's budget decision to the most cost effective way of doing business. As such, compensating benefits analysis is a reasonable application of the Statute which should be affirmed. Moreover, the Schools manifestly failed to sustain their burden under the test, as the court of appeals correctly recognized.

III. THE SCHOOLS HAVE NOT ESTABLISHED THAT A "COMPELLING NEED" EXISTS FOR AN ARMY REGULATION, AND THE REGULATION THEREFORE CANNOT BAR BARGAINING ON THE INSTANT PROPOSALS

1. Employer agencies may not assert their own internal regulations as bars to bargaining unless the regulations are supported by a "compelling need." 5 U.S.C. 7117(a)(2); 5 C.F.R. 2424.11. The compelling need requirement originated in an amendment to Executive Order 11,491 due to agency employers unduly restricting the scope of bargaining under the Order through regulation issuance. Exec. Order No. 11,838, 3 C.F.R. 957 (1971-1975 Comp.). In Section

7117(a)(2) of the Statute the Authority is charged with prescribing regulations to be used in determining whether a compelling need exists for agency regulations. Congress directed the Authority in Section 7117(b)(1) with making particular determinations as to whether a compelling need exists for an agency's regulation so as to bar negotiation over inconsistent proposals.[29]

An administrative agency such as the Authority, when interpreting its regulations which explicitly implement policies established by Congress or the executive, is entitled to even greater deference than it is in interpreting a statute. *Federal Deposit Insurance Corp.* v. *Philadelphia Gear Corp.*, 476 U.S. 426, 439 (1986); *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965). The Authority's interpretation and application of its own regulations is to be set aside only if it is plainly erroneous or inconsistent with its regulation. *Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. 555, 566 (1980).

Under the direction of Section 7117(a)(2) the Authority has formulated three criteria in its regulations

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[29] An agency regulation is, as the name connotes, one issued by an executive agency to govern the conduct of affairs within that agency. It is to be contrasted with a government-wide regulation, as referenced in Section 7117(a)(1), (2) of the Statute, which is applicable to the federal civilian work force generally, and is usually issued by agencies such as the Office of Personnel Management or General Services Administration. *See National Treasury Employees Union, Chapter 6 and Internal Revenue Service, New Orleans District*, 3 F.L.R.A. 747, 754 (1980). All government-wide regulations are a bar to bargaining over matters which would bring about an inconsistency with those regulations. The only agency regulations which act as a bar to bargaining are those for which the Authority finds a compelling need. 5 U.S.C. 7117(a)(1), (2).

to determine whether an agency's regulation will bar bargaining. The criterion here at issue is whether a regulation implements an "essentially nondiscretionary" mandate of "law or other outside authority."[20] 5 C.F.R. 2424.11(c). The burden of demonstrating a compelling need rests with the employing agency. 5 C.F.R. 2424.11. The agency must produce the necessary facts and arguments to support its compelling need claim, as the Authority is not in a position on its own to determine the purposes the regulations are designed to achieve or their importance to the agency. *AFGE, Local 3804 and Federal Deposit Insurance Corporation, Madison Region*, 21 F.L.R.A. 870, 881 (1986).

2. In this case the Army has not proven that its regulation, AR 352-3, § 1-7, implements in a nondiscretionary manner a mandate of Section 241. The language of Section 241 does not mandate specific salaries for Section 6 teachers and school employees, nor does it render the setting of salaries nondiscretionary.

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[20] The Schools attack this criterion (Pet. Br. 33 n.23), the sole basis for their compelling need argument, as redundant with Section 7117(a)(1) of the Statute (proposals inconsistent with law or government-wide rule nonnegotiable). The claim is without merit because an authority other than a statute can contain the mandate a regulation must implement. *NFFE, Local 1669* v. *FLRA*, 745 F.2d 705, 708 (D.C. Cir. 1984) (conference committee report on appropriations bill can contain mandate under 5 C.F.R. 2424.11(c)). Further, a compelling need criterion that creates parity between laws and implementing agency regulations as negotiability bars is hardly error. Finally, the Schools' assertion that the criterion under 5 C.F.R. 2424.11(c) is the only basis for finding a compelling need, is erroneous. Another criterion, not relied on here by the Schools, is whether a regulation is essential to an agency's accomplishment of its mission. 5 C.F.R. 2424.11(a).

In determining the scope of a statute this Court has recognized the language must be examined first. *United States* v. *Monsanto*, 109 S. Ct. 2657, 2662 (1989); *Immigration and Naturalization Service* v. *Hector*, 479 U.S. 85, 88 (1986); *United States* v. *Turkette*, 452 U.S. 576, 580 (1981).

As the court below recognized (Pet. App. 14a), "Section 241 as a whole demonstrates that the Army has wide discretion to set these employees' salaries." Congress in Section 241 has not established specific wage and salary scales for dependents schools employees. Section 241(a), which AR 352-3, § 1-7 is designed to implement, provides in relevant part that Section 6 schools "[t]o the maximum extent practicable" shall ensure that the education they provide be "comparable to free public education provided for children in comparable communities in the State" where the Section 6 school is located." Section 241(e) provides in relevant part that "to the maximum extent practicable," per pupil costs in Section 6 schools will not exceed per pupil costs for free public education for children in comparable communities in the state.

Taking both of these statutory provisions together (even though AR 352-3, § 1-7 purports to implement only Section 241(a)), they require the schools as best they can to provide federal dependents with comparable education to local schools at the same cost as local schools. These provisions of Section 241 do not, however, mandate how the various Section 6 schools

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[21] A law that says that an agency shall do something "to the maximum extent practicable" can hardly be said to issue a mandate as required under 5 C.F.R. 2424.11(c), as the court of appeals correctly noted (Pet. App. 19a).

are to reach these end results. Rather, Section 241 allows the schools discretion in how to reach these goals.[32]

For example, nothing in Section 241 bars a Section 6 school from deciding to invest more heavily than local schools in computers as a learning tool, while scaling back on staff size and pay. Conversely, a Section 6 school could elect under Section 241 to put more resources into staff than do local schools, while de-emphasizing equipment. In either case, so long as education quality and per pupil cost are as nearly as possible the same, Section 241 requirements are satisfied.[33]

The conclusion that a comparable education does not require salary identity is buttressed by the language in the rest of Section 241. The third sentence

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[32] The Schools admit (Pet. Br. 33 n.22) that not all factors in AR 352-3, § 1-7 must be set by comparison to local schools. Yet the Schools provide no basis for distinguishing between which factors in the regulation must be set by local school comparison and which may not, even though most of the factors would affect overall per pupil cost. Accordingly, the Schools' concession undermines the claim that the regulation is a required implementation of Section 241.

[33] The Schools argue (Pet. Br. 33) that Congress recognized in Section 241(a) a link between school employee compensation and education comparability when it said that school employee compensation could be set without regard to various federal pay and benefit laws. The point does not advance the Schools' case. The primary reason for Congress' freeing Section 6 schools from these laws was because of the laws' unsuitability for the peculiarities of school administration (*e.g.*, a nine or 10 month work year for school employees compared to a 12 month work year for most federal employees). S. Rep. 311, 89th Cong., 1st Sess. 4, *reprinted in* 1965 U.S. Code Cong. & Ad. News 1910, 1913. This basis for the Schools' exemption from federal pay and benefits laws hardly supports a conclusion that dependents school employee pay must be identical to that of local school employees.

of Section 241(a) requires dependents schools outside the continental United States, Alaska, and Hawaii to provide a "comparable education" to free public schools in the District of Columbia. 20 U.S.C. 241(a). However, Congress added a sentence to Section 241(a) in 1978 which required that:

> Personnel provided for under this subsection outside of the continental United States, Alaska, and Hawaii, shall receive such compensation, tenure, leave, hours of work and other incidents of employment on the same basis as provided for similar positions in the public schools in the District of Columbia.

20 U.S.C. 241(a). The language of this amendment clearly leaves no room for the way in which these territorial schools' salary and leave matters are set. To interpret "comparable education" to include identical salaries, as suggested by the Army (Pet. Br. 34), would make the additional sentence in 241(a) concerning territorial schools redundant.[34] It is an established axiom of statutory interpretation that statutes

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[34] The legislative history of the 1978 amendment unequivocally shows, contrary to the Army's argument (Pet. Br. 35), there would have been no need for this provision if the term "comparable education" meant identical salaries. The legislative history indicates that representatives of the Antilles Consolidated Teachers Association pointed out that prior to amendment Section 6 "invites abuse by *not specifying personnel practices, especially regarding salary.* * * * As a consequence of this testimony, the Committee has adopted an amendment making clear that the compensation, tenure, leave, hours of work, and other incidents of employment for personnel in school systems located outside of the 50 States must be on the same basis as that provided in the public schools of the District of Columbia." H.R. Rep. No. 1137, 95th Cong., 2d Sess. 108, *reprinted in* 1978 U.S. Code Cong. & Admin. News 4971, 5078 (emphasis provided).

should not be construed to make words meaningless or surplusage where Congress expressly included the words. *United States* v. *Menasche*, 348 U.S. at 538-539 (1955).

3. The Army argues (Pet. Br. 34-35) that since non-wage expenditures account for only a small percentage of any school budget, the court of appeals' conclusion that the Army can still provide a comparable education at a comparable cost per pupil despite variations in teacher pay must be wrong. This argument ignores the fact that, as shown at p. 35, *supra*, salaries and wages accounted for about 58% of the surveyed public schools' total expenditures. Similarly, the Department of Defense budget submission to the Office of Management and Budget shows that compensation for all Defense dependents schools, foreign and domestic, was only about 50% of total schools expenditures for fiscal year 1988 ($469 million out of a total budget of $943 million). Department of Defense, *Budget Justification, Fiscal Year 1990*, Operation and Maintenance, Defense Agencies 210. Certainly, these percentages do not suggest that a school system does not have room for maneuvering in other items of its budget in order to ensure overall per pupil cost equivalency with local schools after increasing pay.

Further, even assuming that other non-wage items such as computers, books, building maintenance, athletic programs, clubs and lunch services account for only a small percentage of the school's budget, the Army still has the flexibility to adjust those factors. In fact, the Army does not indicate how it will be impacted in any way by the monetary increases expected by raising teachers' pay by 13.5%, or for that matter how the union's other proposals concerning

leave would affect those expenditures.[25] The fact that employees may be paid at a higher rate does not mean that the objective under Section 241 to have a comparable education at a comparable per pupil cost cannot be maintained. Improved teacher pay should enhance the quality of that education by attracting more qualified personnel. W. Sparkman and B. Walker, *Education Reform and Changing Compensation Practices*, 14 Journal of Educ. Fin. 76, 87 (Summer 1988).

In sum, AR 352-3, § 1-7 is not required under Section 241, but rather is the Army's own exercise of discretion as to how it chooses to implement that law. Matters of discretion like this are the kinds of things the Statute intended for collective bargaining. *Library of Congress* v. *FLRA*, 699 F.2d at 1289. Accordingly, the Authority and the court below properly held the Army's regulation not to be supported by a compelling need.

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[25] Sections A through G, I and J of proposal 1, which assume that pay rates will be fixed in accordance with pay practices in comparable local school systems, clearly do not conflict with AR 352-3, § 1-7, as the Authority held (Pet. App. 41a). Moreover, Proposal 3, dealing with leave, is unrelated to the salary schedules referenced in § 1-7. Accordingly, even if a compelling need for the Army regulation is found, these proposals are negotiable as not inconsistent with the regulation.

CONCLUSION

The judgment of the court of appeals should be affirmed.[26]

Respectfully submitted.

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DECEMBER 1989

[26] The Acting Solicitor General authorizes the filing of this Brief for the Respondent Federal Labor Relations Authority.

RELEVANT PORTIONS OF THE FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE AS AMENDED, 5 U.S.C. §§ 7103-7135 (1988); 5 C.F.R. § 2424.11; 20 U.S.C. § 241; AND AR 352-3

§ 7103. Definitions; application

(a) For the purpose of this chapter—

* * * * *

(14) "conditions of employment" means personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions, except that such term does not include policies, practices, and matters—

(A) relating to political activities prohibited under subchapter III of chapter 73 of this title;

(B) relating to the classification of any position; or

(C) to the extent such matters are specifically provided for by Federal statute;

* * * * *

§ 7106. Management rights

(a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency—

(1) to determine the mission, budget, organization, number of employees, and internal security practices of the agency; and

(2) in accordance with applicable laws—

(A) to hire, assign, direct, layoff, and retain employees in the agency, or to sus-

pend, remove, reduce in grade or pay, or take other disciplinary action against such employees;

(B) to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted;

(C) with respect to filling positions, to make selections for appointments from—

(i) among properly ranked and certified candidates for promotion; or

(ii) any other appropriate source; and

(D) to take whatever actions may be necessary to carry out the agency mission during emergencies.

* * * * *

§ 7117. Duty to bargain in good faith; compelling need; duty to consult

(a)(1) Subject to paragraph (2) of this subsection, the duty to bargain in good faith shall, to the extent not inconsistent with any Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any rule or regulation only if the rule or regulation is not a Government-wide rule or regulation.

(2) The duty to bargain in good faith shall, to the extent not inconsistent with Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any agency rule or regulation referred to in paragraph (3) of this subsection only if the Authority has determined under subsection (b) of this section that no compelling

need (as determined under regulations prescribed by the Authority) exists for the rule or regulation.

(3) Paragraph (2) of the subsection applies to any rule or regulation issued by any agency or issued by any primary national subdivision of such agency, unless an exclusive representative represents an appropriate unit including not less than a majority of the employees in the issuing agency or primary national subdivision, as the case may be, to whom the rule or regulation is applicable.

* * * * *

§ 7135. Continuation of existing laws, recognitions, agreements, and procedures

* * * * *

(b) Policies, regulations, and procedures established under and decisions issued under Executive Orders 11491, 11616, 11636, 11787, and 11838, or under any other Executive order, as in effect on the effective date of this chapter, shall remain in full force and effect until revised or revoked by the President, or unless superseded by specific provisions of this chapter or by regulations or decisions issued pursuant to this chapter.

5 C.F.R. § 2424.11

§ 2424.11 Illustrative criteria.

A compelling need exists for an agency rule or regulation concerning any condition of employment when the agency demonstrates that the rule or regulation meets one or more of the following illustrative criteria:

(a) The rule or regulation is essential, as distinguished from helpful or desirable, to the accomplishment of the mission or the execution of functions of

the agency or primary national subdivision in a manner which is consistent with the requirements of an effective and efficient government.

(b) The rule or regulation is necessary to insure the maintenance of basic merit principles.

(c) The rule or regulation implements a mandate to the agency or primary national subdivision under law or other outside authority, which implementation is essentially nondiscretionary in nature.

20 U.S.C. § 241

§ 241. Education of children where local agencies cannot supply facilities

(a) Necessary arrangements by Secretary; standard of education

In the case of children who reside on Federal property—

(1) if no tax revenues of the State or any political subdivision thereof may be expended for the free public education of such children; or

(2) if it is the judgment of the Secretary, after he has consulted with the appropriate State educational agency, that no local educational agency is able to provide suitable free public education for such children, the Secretary shall make such arrangements (other than arrangements with respect to the acquisition of land, the erection of facilities, interest, or debt service) as may be necessary to provide free public education for such children.

• • • • •

To the maximum extent practicable, the local educational agency, or the head of the Federal department or agency, with which any arrangement is made under this section, shall take such action as may be necessary to ensure that the education provided pur-

suant to such arrangement is comparable to free public education provided for children in comparable communities in the State, or, in the case of education provided under this section outside the continental United States, Alaska, and Hawaii, comparable to free public education provided for children in the District of Columbia. For the purpose of providing such comparable education, personnel may be employed and the compensation, tenure, leave, hours of work, and other incidents of the employment relationship may be fixed without regard to the Civil Service Act and rules and the following: (1) chapter 51 and subchapter III of chapter 53 of title 5; (2) subchapter I of chapter 63 of title 5; (3) sections 5504, 5541 to 5549, and 6101 of title 5; (4) sections 1302 (b), (c), 2108, 3305(b), 3306(a)(2), 3308 to 3318, 3319(b), 3320, 3351, 3363, 3364, 3501 to 3504, 7511, 7512, and 7701 of title 5; and (5) chapter 43 of title 5. Personnel provided for under this subsection outside of the continental United States, Alaska, and Hawaii, shall receive such compensation, tenure, leave, hours of work, and other incidents of employment on the same basis as provided for similar positions in the public schools of the District of Columbia.

• • • • •

(e) Limit on payments

To the maximum extent practicable, the Secretary shall limit the total payments made pursuant to any such arrangement for educating children within the continental United States, Alaska, or Hawaii, to an amount per pupil which will not exceed the per pupil cost of free public education provided for children in comparable communities in the State. The Secretary shall limit the total payments made pursuant to any such arrangement for educating children

outside the continental United States, Alaska, or Hawaii, to an amount per pupil which will not exceed the amount he determines to be necessary to provide education comparable to the free public education provided for children in the District of Columbia.

AR 352-3

1-7. Comparison factors. Education provided pursuant to the provisions of Section 6 for children residing on Federal property will be considered comparable to free public education offered by selected communities of the State when the following factors are, to the maximum extent practicable, equal:

a. Qualifications of professional and nonprofessional personnel.

b. Pupil-teacher ratios.

c. Curriculum for grades offered, including kindergarten and summer school, if applicable.

d. Accreditation by State or other accrediting association.

e. Transportation services (student and support).

f. Length of regular [illegible]/or summer term(s).

g. Types and nu[illegible] of professional and nonprofessional po[illegible]

h. Salary sch[illegible]

i. Conditi[illegible]ployment.

j. Instruct[illegible] equipment and supplies.

(9)

No. 89-65

In the Supreme Court of the United States

OCTOBER TERM, 1989

FORT STEWART SCHOOLS, PETITIONER

v.

FEDERAL LABOR RELATIONS AUTHORITY AND
FORT STEWART ASSOCIATION OF EDUCATORS

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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TABLE OF AUTHORITIES

In the Supreme Court of the United States

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1. Title VII of the CSRA requires negotiation over "conditions of employment" (5 U.S.C. 7102(2)), which the statute defines as "personnel policies, practices, and matters • • • affecting working conditions" (5 U.S.C. 7103(a)(14)). In our opening brief (at 17), we began our discussion of the first question presented—whether employee compensation is a required subject of negotiation—by stating that "[e]xamined in isolation," the most natural reading of this statutory language refers not to matters such as compensation but to "the physical conditions under which an employee labors." We supported that statement by noting the conclusion of the District of Columbia Circuit that "[t]he term 'working conditions'

ordinarily calls to mind the day-to-day circumstances under which an employee performs his or her job" (*Department of Defense Dependents Schools* v. *FLRA*, 863 F.2d 988, 990 (1988), reh'g en banc granted, No. 87-1733 (Feb. 6, 1989)), and the observation of Justice Stewart that the phrase "conditions of employment" is most naturally read to encompass "the various physical dimensions" of an employee's "working environment" (*Fibreboard Paper Products Corp.* v. *NLRB*, 379 U.S. 203, 222 (1964) (concurring opinion)). See also *Corning Glass Works* v. *Brennan*, 417 U.S. 188, 202 (1974) (the phrase "working conditions" has a "specific meaning in the language of industrial relations," encompassing " 'surroundings' and 'hazards' ").

In their argument on the first question presented, respondents focus their attack on a serious distortion of our position. The Fort Stewart Association of Educators (Association) states, for example, that it is "specious to argue, as petitioner has, that negotiations over 'working conditions' are limited to the physical conditions under which an employee labors." Br. 11; see also FLRA Br. 19-20; AFL-CIO Amicus Br. 3; NTEU Amicus Br. 7. We never made such an argument. Like Justice Stewart, we recognize that the phrase " 'conditions of employment' is no doubt susceptible of diverse interpretations," that the phrase has been extended beyond the purely physical conditions of the workplace, and that "[a]t the extreme, the phrase could be construed to apply to any subject which is insisted upon as a prerequisite for continued employment." *Fibreboard*, 379 U.S. at 221-222 (concurring opinion). Our point—which respondents ignore—is that one would not normally think, upon reading the words of the statute, that by making "conditions of employment"

negotiable Congress had extended the bargaining obligation to include compensation.[1] Thus, it becomes necessary to consider the context of the statute in question, as well as the approach Congress has followed in analogous legislation.

A comparison of the language of Title VII of the CSRA with the language of other statutes mandating collective bargaining confirms the correctness of the initial impression drawn from the statutory language. Congress has *never* made compensation negotiable by using the phrase "conditions of employment." In both the NLRA and the Postal Reorganization Act, for example, it specifically made "wages" negotiable.[2] Moreover, in those statutes it

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[1] The FLRA makes two erroneous arguments concerning the language of Section 7103(a)(14). First, it argues (Br. 19 & n.8) that the phrase "affecting working conditions" modifies "matters" but not "personnel policies" and "practices," so that all "personnel policies" and "practices," but only "matters • • • affecting working conditions," are negotiable. That seems an odd way to read the phrase "personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions." That is especially so since, under the FLRA's reading, the word "practices" would have *no* limiting reference. Moreover, the provision continues by stating that the phrase "conditions of employment" does not include "policies, practices, and matters" in three circumstances, and it is clear that the exceptions relate to "policies" and "practices" as well as to "matters."

The FLRA also contends (Br. 19-20) that the exception in Section 7103(a)(14) for policies, practices, and matters "specifically provided for by Federal statute" would not have been needed unless compensation were a policy, practice, or matter. But the exception is not rendered redundant by our reading of the statute. The exception provides that a statute governing the subject renders *any* matter nonnegotiable, even matters—like safety conditions—that are indisputably conditions of employment.

[2] Respondents and their amici cite other statutes where, in their view, Congress included compensation within the phrase "conditions of employment." For example, the AFL-CIO notes (Br. 9) that the

also made "conditions of employment" or "working conditions" negotiable, indicating that it does not assume such phrases to include compensation.[3]

Respondents have very little to say about the Postal Reorganization Act, even though, like the statute at issue, it governs federal employees. Indeed, the FLRA, the Association, and the NTEU all fail even to cite the statute. There is little that they can say about its language, which makes "wages, hours, and working conditions" negotiable (39 U.S.C. 1201 note); the AFL-CIO merely argues that Congress forgot to insert the word "other" into the statute (Br. 9). That response is especially unconvincing since one of the authors of the bill later enacted as Title VII of the CSRA contrasted the negotiability provision of the bill with that of the Postal Reorganization Act. He stressed that the bill would "not permit bargaining over pay and fringe benefits," adding that those were "the kinds of things that are giving us difficulty in the Postal Service

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section describing the purposes of the Norris-LaGuardia Act states that employees should be free to negotiate over "the terms and conditions of [their] employment." But like the other statutes on which respondents rely, the Norris-LaGuardia Act, which limits the power of courts to issue injunctions affecting labor disputes, does not authorize or mandate collective bargaining. It is the NLRA that governs bargaining in the private sector, and it specifically authorizes bargaining over "wages." 29 U.S.C. 158(d).

[3] Respondents rely on a 1961 Task Force Report suggesting that "[s]pecific areas that might be included among subjects for • • • collective negotiations include the work environment, • • • and where permitted by law the implementation of policies relative to rates of pay." FLRA Br. 24 n.13; Association Br. 12-13. The main lesson to be drawn from that proposal, in our view, is that the Task Force, in suggesting that compensation *might* be made negotiable under certain circumstances, clearly distinguished between "the work environment" and "rates of pay."

today." 124 Cong. Rec. 25,716, 29,182 (1978) (statements of Rep. Udall).[4]

Respondents rely heavily on two decisions of the FLRA's predecessor, the FLRC, which allowed wage bargaining in limited circumstances. The FLRA concedes, however, that there is nothing to indicate that Congress was aware of those decisions. Br. 26 n.16. Moreover, as the Association acknowledges (Br. 18), Congress thought that, under current practice at the time the CSRA was under consideration, "Federal employees may not bargain over pay or fringe benefits." 124 Cong. Rec. 27,549 (1978) (statement of Sen. Sasser). The Association contends that Congress was "mistaken[]" (Br. 18), and that it intended to continue the prior practice reflected in the two FLRC decisions even though it understood the prior practice to prohibit negotiation over compensation. In our view, Congress cannot have intended to continue a practice it knew nothing of; instead this Court should read the limiting statutory language in light of the numerous statements in the legislative history that compensation is not negotiable. See, *e.g.*, S. Rep. No. 969, 95th Cong., 2d Sess. 13 (1978); H.R. Rep. No. 1403, 95th Cong., 2d Sess. 12, 377, 390 (1978); 124 Cong. Rec. 25,716, 29,182

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[4] The FLRA argues (Br. 29) that other supporters of the bill "stated in floor debate that Section 7103(a)(14)(C) of the Statute would remove only matters 'specifically' provided for by statute so that where, as in the instant case, the agency has discretion over a matter, Section 7103(a)(14)(C) would not preclude bargaining." To be sure, many congressmen noted that the statute precluded bargaining over matters specifically provided for by statute. However, contrary to the implication of the FLRA's argument, no congressman said at any point during the debate that employees like the teachers in this case would be able to bargain over pay.

(statements of Rep. Udall), 24,286, 25,720 (statements of Rep. Clay).[3]

Since any proposal that is negotiable under Title VII of the CSRA may be imposed on a federal agency by the Federal Services Impasses Panel (5 U.S.C. 7119(c)(5)(B)(iii)), Congress would surely have made clear that wage bargaining was permitted if that was intended. Although the NTEU fails to appreciate this point (Amicus Br. 20 n.3), we think it obvious that Congress would not sub silentio decide to remove wage scales from agency responsibility and accountability by authorizing an arbitration panel to set federal employees' wages.

2. The second question presented is whether the proposals at issue—particularly the proposal calling for a 13.5% salary increase—are contrary to the management rights provision of Title VII of the CSRA, which provides that nothing in the statute shall "affect the authority of any management official of any agency—(1) to determine the • • • budget • • • of the agency." 5 U.S.C. 7106(a). The Association argues (Br. 23) that if Congress did not bar negotiation over compensation, "it would not have intended a construction of the budget rights clause in § 7106(a)(1) that would foreclose such bargaining." We

[3] The AFL-CIO discounts (Amicus Br. 16-17) the fact that Congress specifically rejected a proposal by Representative Heftel that would have allowed bargaining where a matter was not specifically controlled by statute. It hypothesizes that Congress did not want to enumerate bargainable matters. We agree with the D.C. Circuit that the rejection of Representative Heftel's proposed amendment is "a fact of no little interpretive significance." *Department of Defense Dependents Schools*, 863 F.2d at 992. At the least, Representative Heftel's proposal alerted Congress to the fact that the compensation of some federal employees was not set by the General Schedule or another very specific provision. Yet Congress rejected that proposal and took no action to show that it wanted to allow wage bargaining in that situation.

agree that the first two questions presented by this case are interrelated; but, in our view, the fact that Congress gave control over the budget to agency management *reinforces* the conclusion that it did not intend to open compensation, one of the largest items in most agency budgets, to negotiation and binding arbitration.

The Association (Br. 25-26) and the AFL-CIO (Amicus Br. 21-22) endorse the court of appeals' conclusion (Pet. App. 20a) that the proposals here are negotiable because they are not significant when compared to the Army's budget as a whole. The FLRA disowns that approach, noting that "[t]he Authority in its decision did not refer to the proposals' cost in relation to the overall Army budget" and that in a prior case "the Authority assessed the significance of a proposal's cost in relation to the school's budget." Br. 36 & n.26. We agree with the FLRA's view in that prior case: the significance of a proposal should be tested against the program budget rather than the agency budget as a whole. Otherwise, as stated in our opening brief (at 29-30), the cost of any proposal with respect to programs like this one would not be significant. Congress did not intend the budget clause of the management rights provision to have so little meaning.

The FLRA's present approach, while properly rejecting the court of appeals' rationale, contains significant defects of its own. The Authority believes that "[m]ere cost of a proposal alone is an insufficient basis to find interference with the Statute's budget right." Br. 15. It further claims that "[m]anagement's determination of its budget is, of course, functionally distinct from management's determination to incur costs, as even the Schools recognize." Br. 37. To the contrary, we do not see any such distinction. It seems evident that any proposal that would require an agency to incur significant costs—such as a proposal to increase teachers' salaries by 13.5%—would interfere with

its right to determine its budget. Indeed, we believe that opening an item such as teachers' salaries to bargaining necessarily interferes with the budget right. As the FLRA states (Br. 35), teachers' salaries are typically by far the largest item in any school budget. Accordingly, that item must be off limits in collective bargaining if dependents schools are to have control of their budgets.

The FLRA further contends that Fort Stewart failed to meet its burden—which the Authority contends is "reasonably placed on the agency employer"—of proving that the benefits that might follow from a 13.5% salary increase would not compensate for the increase in costs. Br. 38. In our view, such a burden cannot "reasonably" be placed on the employer. As the Fourth Circuit explained, "the FLRA's test makes itself, not the agency, the arbiter of the agency's budget," even though Congress reserved the budget right to agency management. *Nuclear Regulatory Commission* v. *FLRA*, 879 F.2d 1225, 1233 (1989) (en banc), petitions for cert. pending, Nos. 89-198 and 89-562. Moreover, the FLRA is asking the federal employing agencies to do the job of the unions. If it were reasonable to allow the FLRA to decide whether the benefits of a proposal outweigh its costs, then the unions should at least be required to bear the burden of showing what the compensating benefits would be in a particular case. The proposal, after all, is their idea. It is surely not surprising, as the FLRA acknowledges (Br. 38 n.28), that no agency has ever undertaken to prove the benefits that would flow from acceptance of a union proposal.

3. The dependents schools' statute, 20 U.S.C. 241, requires that the education provided at the domestic dependents schools be comparable to the education provided at public schools in the State (Section 241(a)) and, "[t]o the maximum extent practicable," be furnished at a cost per pupil not exceeding that in comparable communities in the

State (Section 241(e)). In a regulation implementing the statute, the Army has provided that salary schedules at the dependents schools are to be comparable to those at local public schools. Army Reg. 352-3, 1-7(h) (1980). On the third question presented in this case, the FLRA disagrees with the Army's view that there is a "compelling need" for this regulation. The FLRA reads Section 241 as merely precatory because it requires comparability only to the maximum extent practicable; the Authority contends that such a law "can hardly be said to issue a mandate." Br. 43 n.31.[6] In our view, that is a fundamental error. A statutory directive must be respected, even when it allows an agency some flexibility. *Department of the Navy, Military Sealift Command* v. *FLRA*, 836 F.2d 1409, 1415 (3d Cir. 1988).[7]

Like the court of appeals (Pet. App. 18a), the FLRA (Br. 43-44) suggests that there is, in any event, no compelling need for the regulation because Fort Stewart could maintain per pupil cost comparability by "deemphasizing equipment." As stated in our opening brief (Br. 34-35), that is no answer at all. A school without books, or com-

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[6] The FLRA's interpretation of Section 241, which is not part of Title VII of the CSRA, is not entitled to deference. *Fort Knox Dependent Schools* v. *FLRA*, 875 F.2d 1179, 1181 (6th Cir. 1989); *West Point Elementary School Teachers Ass'n* v. *FLRA*, 855 F.2d 936, 940 (2d Cir. 1988); Pet. App. 13a.

[7] The Association argues (Br. 43-44) that per pupil costs at Fort Stewart will not be identical to those at the local public schools, even if salary schedules are equal. As it suggests, it would be impracticable, if not impossible, for Fort Stewart to match the local public schools' payroll costs exactly; that would require, for example, teaching staffs that corresponded in experience and professional training. That is why Congress mandated equality to the maximum extent practicable. But the impracticability of exact cost equality is no reason to ignore Congress's direction.

puters, or chemistry laboratories is not comparable to one with such equipment merely because its teachers are paid more. See *Fort Knox Dependents Schools* v. *FLRA*, 875 F.2d 1179, 1182 (6th Cir. 1989).[8]

The NTEU contends (Amicus Br. 27) that the negotiability of the proposals here is supported by the two FLRC cases authorizing bargaining over wages prior to the enactment of Title VII of the CSRA. The respondents make no such contention, presumably because of the sharp contrast between the proposals in the FLRC cases and the proposals in this case. In *Overseas Education Ass'n, Inc. and Department of Defense, Office of Dependents Schools*, 6 F.L.R.C. 231, 231 (1978), and *United Federation of College Teachers and U.S. Merchant Marine Academy*, 1 F.L.R.C. 211, 212 (1972), the proposals sought to implement statutory commands comparable to that in Section 241. In *United Federation of College Teachers,* for example, the teachers' union proposed salary increases that would have made the pay of teachers at the Merchant Marine Academy comparable to that of the Naval Academy, as the governing statute required. 1 F.L.R.C. at 212. The Association makes no comparable proposal here. Indeed, while acknowledging that per pupil costs at Fort

[8] The FLRA suggests (Br. 44) that there is considerable room for "deemphasizing equipment." It relies upon 1988 budget figures for all of the dependents schools, including those located in foreign countries (which have more students than those in this country and are governed by a separate statute, 20 U.S.C. 902), which showed that compensation accounted for about half of costs at the schools. In fact, we have been informed that compensation accounts for a much higher percentage of the budget at the domestic dependents schools. But, even if the figure were "only" 50%, it would be clear (a) that no item in the budget exceeded compensation and (b) that any significant increase in compensation would require substantial cutbacks elsewhere.

Stewart already exceed those at local public schools (Br. 42-43), the Association seeks to increase that disparity.

Both respondents rely heavily on the language in Section 241(a) relating to the dependents schools located in the Territories. FLRA Br. 44-46; Association Br. 29-31. This reliance, however, simply underscores respondents' failure to read Section 241 as a whole, including subsection (e). As stated in our opening brief (Br. 35-36 n.25), the cost of living in the Territories differs from the cost of living in the 50 States. Accordingly, Congress's mandate with respect to costs at the schools in the Territories differs from its mandate in Section 241(e) with respect to the domestic dependent schools. While Section 241(e) provides that per pupil costs at the *domestic* dependents schools should "not exceed the per pupil cost of free public education provided for children in comparable communities in the State," it provides that per pupil costs at the schools in the *Territories* should not exceed the amount determined "to be necessary to provide education comparable to the free public education provided for children in the District of Columbia." Since there is no mandate in Section 241(e) that per pupil costs in the Territories be comparable to per pupil costs in the District, but only a mandate that the education provided be comparable, Congress provided in Section 241(a) that teachers' salaries in the Territories should be set by comparison with those in the District. There was no need to do so with respect to the domestic dependent schools because Section 241(e) itself directs that per pupil costs at those schools be maintained as closely as practicable to those at the local public schools.

For these reasons and the reasons stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

JOHN G. ROBERTS, JR.
*Acting Solicitor General**

DECEMBER 1989

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* The Solicitor General is disqualified in this case.

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No. 89-65

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OCTOBER TERM, 1989

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and
FORT STEWART ASSOCIATION OF EDUCATORS,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR AMICUS CURIAE NATIONAL TREASURY EMPLOYEES UNION IN SUPPORT OF RESPONDENTS

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BRIEF FOR AMICUS CURIAE NATIONAL TREASURY EMPLOYEES UNION

INTEREST OF AMICUS CURIAE

Amicus Curiae, the National Treasury Employees Union (NTEU), is a federal sector labor union that is the exclusive bargaining representative of over 140,000 federal employees nationwide. NTEU represents the interests of members of its bargaining units by, among other things, negotiating collective bargaining agreements

with agency employers and arbitrating grievances under those agreements.

NTEU has made pay proposals for workers in two agencies, the Nuclear Regulatory Commission and the Federal Deposit Insurance Corporation, where wages are not set by federal statute. In fact, NTEU's own petition for certiorari is pending before the Court in a related case, *National Treasury Employees Union v. United States Nuclear Regulatory Commission, petition for writ of certiorari pending*, No. 89-198, which the Court is apparently holding in abeyance until disposition of the instant case, as requested by the Solicitor General. *See also FLRA v. National Treasury Employees Union, petition for writ of certiorari pending*, No. 89-562. NTEU's case raises an issue identical to the first issue here, regarding the negotiability of wages as "conditions of employment" under the Civil Service Reform Act. 5 U.S.C. 7103(a)(14). The two remaining questions in the NTEU case, moreover, are similar to the second and third issues here. These questions relate to the effect NTEU's pay proposals have on management's budget rights and the degree of pay discretion an agency must have to be able to bargain over compensation matters.

NTEU and its members, in short, have a strong and direct interest in the instant proceeding, as well as expertise relating to those issues. Accordingly, NTEU files this brief as *amicus curiae* in support of respondents, the Federal Labor Relations Authority and the Fort Stewart Association of Educators, with the written consent of all parties.

SUMMARY OF ARGUMENT

Pay proposals are negotiable because wages are "conditions of employment," which are defined in the Civil Service Reform Act (CSRA) to include both personnel policies and practices, as well as matters affecting work-

ing conditions. 5 U.S.C. 7103(a)(14). The Agency's attempt to limit "conditions of employment" to "the physical conditions under which an employee labors," is illogical and unsupported by the statutory language. Moreover, federal agencies routinely negotiate about, and arbitrate grievances concerning, "conditions of employment" that are totally unrelated to the physical aspects of a job.

The Agency also wrongly asserts that the phrase "conditions of employment" is used in other federal labor statutes to exclude wages; on the contrary, the phrase includes pay matters under other such statutes. In any event, Congress adopted the operative language in the CSRA from the predecessor executive order program governing federal labor relations, under which compensation matters were consistently viewed as negotiable personnel policies, where not governed by statute. The legislative history of the CSRA, furthermore, demonstrates that Congress intended to broaden, and in no way diminish, the scope of federal collective bargaining, which had always included pay bargaining for employees whose pay was not set by law. Finally, given the structure of this statutory scheme, Congress would have specifically excluded all wage bargaining, if that is what it intended.

The Agency unreasonably seeks to nullify Congress' intent to permit pay bargaining (where wages are not set by statute) by claiming that such bargaining would necessarily interfere with management's right to determine its budget under 5 U.S.C. 7106(a)(1). The Federal Labor Relations Authority (FLRA) has constructed a reasonable rule that requires agencies to show that a proposal would lead to unavoidable and significant increased costs that would not be outweighed by compensating benefits. Management cannot hide behind the budget right where it is unable to demonstrate that a sound cost-benefit analysis renders the proposal unjustified.

Finally, the pay proposals here are not inconsistent with the Agency's statutory discretion to set wages, nor with an Agency rule for which there is a "compelling need." *See* 5 U.S.C. 7117(a)(1) and 7117(a)(2). Pay bargaining is consistent with an agency's statutory pay authority where, as here, management has a significant degree of discretion in fixing wages.

ARGUMENT

I. WAGES ARE "CONDITIONS OF EMPLOYMENT" WITHIN THE MEANING OF TITLE VII OF THE CIVIL SERVICE REFORM ACT.

In accord with the FLRA, the Eleventh Circuit below and the Second Circuit have had no trouble concluding that the most basic of all incidents of employment—namely wages—are "conditions of employment" within the meaning of the statute governing federal labor relations. Appendix to petition for certiorari (Pet. App.) 7a; *West Point Elementary School Teachers Ass'n v. FLRA*, 855 F.2d 936, 942-44 (2d Cir. 1988). "Conditions of employment" is the basic phrase Congress has used to describe matters to be negotiated, unless they are made non-negotiable by specific exclusions. 5 U.S.C. 7103(a)(12). For example, wages for the vast majority of federal employees are set by other federal laws, so their pay is made non-negotiable by the exclusion for matters "provided for by Federal statute." 5 U.S.C. 7103(a)(14)(C). "Conditions of employment" are defined in the CSRA as encompassing all "personnel policies, practices, and matters . . . affecting working conditions." 5 U.S.C. 7103(a)(14).

Petitioner Fort Stewart Schools (the Agency) takes the position that the statutory reference to "conditions of employment" is "most naturally read to refer to the physical conditions under which an employee labors." Petitioner's Brief (Pet. Br.) 17. The Agency would have

considerable difficulty convincing an employee of this alleged natural reading. Pay, not desk location or other physical attribute, is the key "condition" of an employment relationship, within any common understanding of the word.

Moreover, the Agency seems to disregard the fact that the extremely broad statutory definition of "conditions of employment" includes "personnel policies [and] practices." The Agency can offer no persuasive explanation why decisions concerning employee pay do not constitute "personnel policies" or practices. Contrary to the Agency's apparent position, there is simply no basis for suggesting that such policies and practices may be reasonably construed as limited to the physical circumstances of the workplace. Indeed, well settled precedent under the CSRA is to the contrary. *See, e.g., EEOC v. FLRA*, 744 F.2d 842, 850 n.18 (D.C. Cir. 1984), *cert. dismissed*, 476 U.S. 19 (1986) ("matters . . . affecting working conditions" are not limited to job surroundings and, in any event, personnel policies and practices are not so limited); *Department of Defense v. FLRA*, 685 F.2d 641, 647 (D.C. Cir. 1982) (policies regarding the rationing of consumer goods at military post exchanges are conditions of employment).

The Agency's assertion that the definition of "conditions of employment" embraces only "the physical conditions under which an employee labor" suffers from five other fatal flaws. First, it would read out of the statute innumerable topics that are routinely negotiated, and grieved, in the federal sector. Second, it is based on the demonstrably incorrect premise that "other federal labor statutes confirm[] that Congress does not regard 'wages' as a 'condition[] of employment.'" Pet. Br. 17. Third, the CSRA adopted the operative language and precedent under the predecessor executive order program, under which wages were consistently deemed negotiable where not provided for by statute. Fourth, the legislative his-

tory demonstrates that Congress intended the scope of bargaining under the CSRA to be broader, not narrower, than under the executive orders, and intended that employment matters be negotiable when not governed by other statutes; the Agency reads passages from the legislative history regarding general unavailability of pay bargaining, for the majority of federal workers, out of context. Fifth, the Agency incorrectly reasons that Congress would have listed pay as a negotiable item, if it so intended; on the contrary, the structure of this particular statutory scheme makes it more likely that Congress would have excluded pay, if that were the intended result.

A. Federal Agencies Routinely Negotiate, and Arbitrate, Over "Conditions of Employment" That Do Not Relate to Physical Job Conditions.

The Agency's novel position—that "conditions of employment" include only "the physical conditions under which an employee labors"—would rewrite the history of federal collective bargaining. It would also rewrite the history of grievance arbitration, which includes claims of violations of law or regulations "affecting conditions of employment." *See* 5 U.S.C. 7103(a)(9)(C)(ii).

First, collective bargaining agreements have always contained provisions unrelated to physical job conditions. Federal agencies routinely bargain over such non-physical matters. NTEU's most recent contracts with the Internal Revenue Service (IRS), the Customs Service (Customs), and the Department of Health and Human Services (HHS) illustrate this point. Each contract includes innumerable negotiated items that are patently unrelated to "the physical conditions under which an employee labors."

Even cursory review of the Tables of Contents of these three contracts (reproduced hereto as addenda A,

B and C) demonstrates that most of the issues governed by these collective bargaining agreements are in no way related to "the physical conditions under which employees labor," but relate instead to other important aspects of the employment relationship. Examples include, but are not limited to: 1) merit promotion (IRS Contract Art. 13, Customs Contract Art. 17, HHS Contract Art. 19); 2) training and career development opportunities (IRS Contract Art. 30, Customs Contract Art. 10, HHS Contract Art. 21); 3) performance appraisal systems (IRS Contract Art. 12, Customs Contract Art. 16, HHS Contract, Art. 46); 4) incentive awards (IRS Contract Art. 18, HHS Contract Art. 45); 5) employee counseling programs (HHS Contract Art. 43); 6) leave, from annual to maternity, to administrative, to sick leave policies (IRS Contract Art. 32-36, Customs Contract Art. 13, HHS Contract, Art. 30-35); and 7) outside employment (IRS Contract Art. 6, Customs Contract, Art. 26, HHS Contract Art. 51).

Second, the Agency's startling notion that "conditions of employment" under the CSRA are limited to "physical" job conditions is refuted by the history of grievance arbitration under the statute. Congress has used the all inclusive, generic phrase "conditions of employment" to define the scope, not just of collective bargaining, but of certain grievances as well. Congress has made a finding that employees' right to organize "facilitates and encourages the amicable settlements of disputes between employees and their employers involving *conditions of employment*. . . ." 5 U.S.C. 7101(a)(1)(C) (emphasis supplied). Each collective bargaining agreement must contain grievance procedures providing for binding arbitration. 5 U.S.C. 7121(b)(3)(C). A "grievance," in turn, is defined as including "any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting *conditions of employment*." 5 U.S.C. 7103(a)(9)(C) (emphasis supplied).

It is abundantly clear, after eleven years of grievance arbitration under the CSRA, that "conditions of employment" encompassed by the mandatory grievance procedures are not limited to physical aspects of a job. The grievance procedure embraces claimed violations of laws or rules affecting conditions of employment that have nothing to do with physical work conditions. *See, e.g., EEOC v. FLRA*, 744 F.2d at 850 n.18; *Andrade v. Lauer*, 729 F.2d 1475, 1485 (D.C. Cir. 1984) (claimed violations of law, rule or regulation "affecting conditions of employment" include reductions in force, which therefore are subject to mandatory arbitration procedures). The Agency's interpretation of "conditions of employment" thus conflicts with grievance arbitration, in addition to collective bargaining, practices in the federal sector. To achieve its desired result of excluding pay from the "conditions of employment" that are made negotiable by section 7103(a)(12), the Agency is forced to read that phrase in a manner conflicting with its undisputed meaning under subpart (a)(9) of the same section.

B. Wages Are "Conditions of Employment" Under Other Federal Labor Statutes.

The Agency is simply wrong in asserting (Pet. Br. 17) that Congress has used the terms "conditions of employment" or "working conditions" to exclude pay in other federal labor statutes. On the contrary, these terms include compensation in such statutes, including the National Labor Relations Act (NLRA).

In the every first section of the NLRA, which lists fundamental "Findings and declaration of policy," Congress specifies wages and hours as the two basic "working conditions." Congress declared that collective bargaining promotes the flow of commerce by encouraging "friendly adjustment of industrial disputes arising out of differences as to *wages, hours or other working conditions.*" 29 U.S.C. 151 (emphasis supplied). Similarly, Congress included rates of pay and wages as examples of "conditions

of employment" triggering collective bargaining rights. Section 9(a) of the NLRA provides that labor representatives shall be exclusive representatives of all unit employees "for the purposes of collective bargaining in respect to *rates of pay, wages, hours of employment, or other conditions of employment* . . . ." 29 U.S.C. 159(a) (emphasis supplied). Since the Wagner Act of 1933, therefore, Congress has expressly classified pay among "working conditions" and "conditions of employment," the same language used in the CSRA.

Nowhere in the NLRA does Congress depart from its designation of wages as "conditions" of employment. The Agency heavily relies (Pet. Br. 18) on section 8(d) of that statute, added by the 1947 Taft-Hartley amendments. That section, however, in no way undermines the long-standing classification of wages as conditions of employment, but merely uses the generic phrase "terms and conditions," to describe wages and other such incidents of employment.

Section 8(d), which imposed a mutual obligation to bargain in good faith, on unions as well as employers, authorizes such collective bargaining over "wages, hours and *other terms and conditions* of employment." 28 U.S.C. 158(d) (emphasis supplied). The use of the word "other" reflects Congress' view that wages and hours, among other matters, are both "terms and conditions" of employment.

There is no basis for parsing the phrase "terms and conditions" and classifying wages as solely terms and hours as solely conditions. "Conditions" and "terms" are synonyms. Roget's International Thesaurus 383 (4th ed. 1977); Webster Encyclopedic Dictionary, Dictionary of Synonyms and Antonyms 16 (1980 ed.). Hours are no less "terms" of employment than are wages. Conversely, wages are as much "conditions" of employment as are hours. The Agency's attempt to draw a distinction be-

tween "terms" and "conditions" distorts what has always been considered to be a single, generic phrase. *See Jacksonville Bulk Terminals, Inc. v. International Longshoremen's Ass'n*, 457 U.S. 702, 714 (1982) (identifying wages, among other things, as being at the core of "terms and conditions of employment").

Both the courts and the National Labor Relations Board, in fact, have consistently held that compensation matters are "conditions of employment" under the NLRA. In *Richfield Oil Corp. v. NLRB*, 231 F.2d 717 (D.C. Cir.), *cert. denied*, 351 U.S. 909 (1956), the court of appeals, enforcing a Board decision, held that an employer's stock purchase plan was within the duty to bargain. The court agreed with the Board that the plan constituted "wages" and alternatively held that such financial consideration—offering "emoluments of value"—in any event qualified as "conditions of employment." 231 F.2d at 724.

In so holding, the D.C. Circuit embraced the Seventh Circuit's decision in *Inland Steel Co. v. NLRB*, 170 F.2d 247 (7th Cir. 1948), *cert. denied*, 336 U.S. 960 (1949), which had held, again in agreement with the Board, that a retirement and pension plan qualified as both wages and conditions of employment. 170 F.2d at 253. Both *Richfield Oil Corp.* and *Inland Steel Co.* expressly recognized that employee compensation, in whatever form, constitutes an essential "part of the consideration for work performed" by which the employee's "financial status would be enhanced." For these reasons, such compensatory matters are "clearly included" in the phrase "conditions of employment" as used in the NLRA. 231 F.2d at 724, *quoting* 170 F.2d at 253. *See also Weyerhaeuser Timber Co.*, 87 N.L.R.B. 672 (1949) (holding that employer furnished meals were both wages and conditions of employment); *Singer Manufacturing Co.*, 24 N.L.R.B. 444 (1940), *modified on other grounds and enforced*, 119 F.2d 131 (7th Cir.), *cert. denied*, 313 U.S. 595 (1941) (holding that bonuses are an integral part of

the working conditions of employees and thus a subject of bargaining).[1]

As one authority has summarized, employee compensation "in a wide variety of forms has been held to be 'wages' or 'other conditions of employment,' and thus a mandatory subject of bargaining." Smith, Merrifield & St. Antoine, *Labor Relations Law* 612 (5th ed. 1974).

In addition to the NLRA, other federal statutes cited in the Agency's own brief (Pet. Br. 18-19 & n.9) classify pay matters as "conditions of employment." The Senior Executive Service Act provides for a "compensation system, including salaries, benefits, and incentives and for *other conditions of employment.*" Pub. L. No. 95-454, Tit. IV, § 402(a), 92 Stat. 1154, *codified at* 5 U.S.C. 3131(1) (emphasis supplied). Similarly, 18 U.S.C. 4082(c)(2)(iii) provides for "the rates of pay and *other conditions of employment*" of federal prisoners on work release. (Emphasis supplied).

The Agency's fundamental premise, in short, is in error. Contrary to the Agency's assertion (Pet. Br. 17), a review of other federal labor statutes reveals that Congress in fact regards wages as conditions of employment and working conditions. It is the Agency alone, not Congress, which attempts to draw an illogical distinction between "terms" and "conditions" of employment.

C. The CSRA Adopted the Operative Language of the Executive Order Program, Under Which Wages Were Treated as Negotiable Personnel Policies, Practices or Matters Affecting Working Conditions.

This Court has already implicitly recognized that Congress used the term "conditions" of employment in the CSRA as meaning the same thing as "terms" or other

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[1] *See also* Morris, *The Developing Labor Law*, Ch. 16 at 750, 758 (1983) (explaining *Singer* and also noting that the 1947 Taft Hartley amendments did not alter Board definitions of subjects of bargaining).

incidents of employment. "[T]he Act requires federal agencies and unions representing agency employees to 'negotiate over *terms and conditions of employment*, unless a bargaining proposal is inconsistent with existing federal law, rule, or regulation.'" *Cornelius v. Nutt*, 472 U.S. 649, 652 (1985) (emphasis supplied), *quoting Bureau of Alcohol, Tobacco and Firearms v. FLRA*, 464 U.S. 89, 92 (1983).

Wages have always been viewed as "conditions of employment," which are negotiable so long as not governed by statute, under the labor-management program in the federal sector. The CSRA's definition of "conditions of employment" as "personnel policies, practices and matters . . . affecting working conditions" was adopted verbatim from executive orders governing labor relations. Exec. Order No. 10,988, § 6(b), 27 Fed. Reg. 551 (1962), *reprinted in Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978*, 96th Cong., 1st Sess. 1211, 1214 (Comm. Print 1979) *(Legislative History)*; Exec. Order No. 11,491, § 11(a), 43 Fed. Reg. 17,605 (1969), *Legislative History* at 1250.

This language was consistently viewed as including wages for those employees whose pay was not provided by statute. President Kennedy's 1961 task force, chaired by Secretary of Labor Arthur Goldberg, formulated the first government-wide labor relations policy. The task force reported that numerous agencies had voluntarily recognized employee organizations and that certain agencies had "relationships that are close to full scale collective bargaining" with unions.[2] Report of the President's Task Force on Employee-Management Relations in the Federal Service, a Policy for Employee-Management Cooperation in the Federal Service (1961), *Legislative History* at 1187.

[2] Specifically, the Tennessee Valley Authority and some offices of the Department of the Interior had engaged in such bargaining. *Legislative History* at 1187.

The presidential task force reported that employers "in most parts of the Federal Government cannot negotiate on pay, hours of work or most fringe benefits" because such matters "are established by law." *Legislative History* at 1200. Where not established by law, however, pay matters were negotiated. For example, the Interior Department had been voluntarily bargaining, with unions such as the IBEW, over pay for skilled craftsmen and semiskilled laborers who were exempt under the Classification Act. *Department of Energy, Western Area Power Administration and IBEW Locals 640, 1245, 1759, 1959 and 2159*, 22 F.L.R.A. 758, 802-03 (1986). Certainly, the rights of specified groups of skilled craftsmen to bargain over pay matters have long been recognized. *See* 5 U.S.C. 5342(a)(2); 5343 note. When President Kennedy's task force developed a government-wide labor-relations model, it expressly recommended that agencies be permitted to continue to bargain over wages for those employees whose pay was not set by statute. Subjects for collective bargaining, as viewed by the task force, would include "where permitted by law the implementation of policies relative to rates of pay and job classification." *Legislative History* at 1201. President Kennedy accordingly directed the preparation of an executive order pursuant to the task force's recommendations, noting that "where salaries and other *conditions of employment* are fixed by the Congress these matters are not subject to negotiation." *Legislative History* at 1178 (emphasis supplied). Salaries not fixed by Congress, however, were to remain among such negotiable "conditions of employment."

Thus, the first executive order setting a government-wide labor relations program was created, authorizing negotiations over "personnel policy and practices and matters affecting working conditions, so far as may be appropriate subject to law and policy requirements." Exec. Order 10,988, § 6(b), *Legislative History* at 1214. President Nixon, moreover, retained the same operative language when he revised the labor relations program

through Executive Order No. 11,491. Section 11(a) of the Nixon Executive Order required negotiation as to "personnel policies and practices and matters affecting working conditions, so far as may be appropriate under applicable laws and regulations. . . ." *Legislative History* at 1250.

The Federal Labor Relations Council (FLRC), consisting of the Secretary of Labor, Civil Service Commission Chairman, and an official from the office of Management and Budget, was the predecessor of the FLRA, charged with responsibility for resolving negotiability disputes. In its very early stages, the FLRC read the key language—"personnel policies and practices and matters affecting working conditions"—to include pay.

In 1972, the FLRC was confronted with proposals relating to faculty compensation at the U.S. Merchant Marine Academy. The FLRC concluded that such bargaining was not inconsistent with federal law and specifically held that the pay proposals were "negotiable as 'personnel policies and practices and matters affecting working conditions' under section 11(a)" of Executive Order No. 11,491. *United Federation of College Teachers Local 1460 and U.S. Merchant Marine Academy*, 1 F.L.R.C. 211, 218 (1972). Similarly, the FLRC held in February 1978, just a few months before enactment of the CSRA, that pay proposals regarding teacher salaries at overseas dependents schools were negotiable under the same executive order. *Overseas Education Ass'n and Department of Defense Dependents Schools*, 6 F.L.R.C. 231, 232-34 (1978).

Contrary to the Agency's protestations that these two cases turned on whether the pay proposals were contrary to other statutes or regulations (Pet. Br. 25), the FLRC's pay decisions are directly applicable here. There would have been no reason to reach the question of inconsistent law if the pay proposals were not within the scope of the

executive order, which embraced only "personnel policies and practices and matters affecting working conditions," the same operative language later used in the CSRA.

The Agency's main attempt to escape from the FLRC pay decisions is to argue that "it appears that Congress was unaware of them." Pet. Br. 25. Such an assumption, however, turns a basic rule of statutory construction on its head. In the absence of evidence to the contrary, which does not exist here (*see, infra* at 16-19), Congress is presumed to have been aware of, and to have adopted, administrative interpretations of a pre-existing law. *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978); *New York Council, Ass'n of Civilian Technicians v. FLRA*, 757 F.2d 502, 509 (2d Cir.), *cert. denied*, 474 U.S. 846 (1985).

In this instance, in fact, Congress affirmatively expressed its intent to adhere to prior "decisions issued under [the] Executive Orders" governing labor relations, "unless superseded by specific provisions" of the CSRA. 5 U.S.C. 7135(b). The CSRA's adoption of the nearly identical definition of those employment incidents subject to bargaining does not "supersede" the executive orders in the sense of rejecting prior precedent interpreting that same language. On the contrary, the use of the same terms provides strong evidence that Congress intended to adopt the FLRC precedent treating wages as negotiable personnel policies, as the court below concluded. Pet. App. 12a-13a.

D. The Legislative History Supports, Rather Than Undermines, the Interpretation That Pay Is Negotiable Where Not Set By Separate Statute.

There is abundant evidence that Congress intended to continue the bargaining over pay that had taken place under the executive order program, and no evidence of intent to cut back on such bargaining rights. The scope of negotiations under the CSRA was to be no narrower than what had taken place under section 11(a) of Ex-

ecutive Order 11,491. S. Rep. No. 969, 95th Cong., 2d Sess. 104 (1978), *Legislative History* at 764. Congressman Udall emphasized that employees were being given "greater rights" than they had before. 124 Cong. Rec. 25,716 (1978), *Legislative History* at 850. As Congressman Ford stated, in explaining the express preservation of the rights of certain "prevailing rate" employees to negotiate over pay, "we should not now be narrowing the preexisting collective bargaining rights of *any group* of Federal employees." 124 Cong. Rec. H8468 (daily ed. Aug. 11, 1978), *Legislative History* at 857 (emphasis supplied).

This Court has already recognized that passage of the CSRA "constitutes a strong congressional endorsement of the policy on which the federal labor relations program had been based since its creation in 1962." *Bureau of Alcohol, Tobacco and Firearms v. FLRA*, 464 U.S. at 103. In fact, the courts of appeals have uniformly concluded that the intent was to broaden, certainly not to narrow, the scope of collective bargaining. *New York Council, Ass'n of Civilian Technicians v. FLRA*, 757 F.2d at 508; *Library of Congress v. FLRA*, 699 F.2d 1280, 1283-86 (D.C. Cir. 1983); *National Treasury Employees Union v. FLRA*, 691 F.2d 553, 559 (D.C. Cir. 1982); *Department of Defense v. FLRA*, 659 F.2d 1140, 1154-56 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 945 (1982). The CSRA "was designed to expand the scope of negotiations from its limited role under then existing law." *National Treasury Employees Union v. FLRA*, 810 F.2d 295, 299 (D.C. Cir. 1987).

In response to the undisputed congressional intent to retain and expand upon the negotiability rights existing under the executive orders, the Agency isolates certain statements in the legislative history and reads them out of context. Specifically, the history contains general statements that pay is non-negotiable; but these statements were made only because there had been a raging debate

over whether to make pay negotiable in all agencies. Legislators thus occasionally stated that the system of fixing pay by statute for the vast majority of federal employees was retained. "A close examination of the congressional reports and debates reveals that the [CSRA's] supporters made these statements with the understanding that Congress generally regulates such matters . . ., not with the understanding that the [Act] barred all wage negotiations." Pet. App. 10a.

All of the legislative history cited by the Agency can be explained in this manner, as addressing the battle over making wages negotiable for all, rather than negating the negotiability of wages for the few not governed by statute. For example, Congressman Udall stated that the statute would not "permit bargaining over pay." 124 Cong. Rec. 25,716 (1978), *Legislative History* at 850. But he clarified later, when he offered the ultimately accepted "Udall substitute," that pay bargaining was excluded because major enactments "about wages and hours and retirement and benefits will continue to be established by law through congressional action." 124 Cong. Rec. 29,182 (1978), *Legislative History* at 923. Nowhere does he suggest that pay bargaining for those few employees not governed by separate statute would suddenly be halted. On the contrary, he emphasized that the statute continues prior practices and, in fact, "gives Federal employees greater rights in labor relations than they have heretofore enjoyed." 124 Cong. Rec. 25,716 (1978), *Legislative History* at 850.

Similarly, Congressman Clay initially stated that "employees still . . . cannot bargain[] over pay," a statement that only applied to employees in general, not to the few whose wages were not set by law. 124 Cong. Rec. 24,286 (1978), *Legislative History* at 839. He also made clear that he accepted the "Udall substitute" only with the understanding that matters not governed by statute (or

otherwise expressly excepted) would continue to be negotiable:

> 7103(a)(14)(D), removing from subjects of bargaining those matters specifically provided for by Federal statute, was adopted by the Committee and retained in the Udall substitute with the clear understanding that only matters "specifically" provided for by statute would be excluded under this subsection. Thus, where a statute merely vests authority over a particular subject with an agency official given discretion in exercising that authority, the particular subject is not excluded by this subsection from the duty to bargain over conditions of employment.

124 Cong. Rec. 29,187 (1978), *Legislative History* at 933.

This same understanding is implicit in each of the statements made in the legislative history regarding the general unavailability of pay negotiations. Each reference was describing the situation for most workers, whose pay remained non-negotiable because of the exception for matters controlled by other statutes. As Congressman Ford stated, "no matters that are governed by statute (such as pay, money-related fringe benefits, and retirement and so forth) could be altered by a negotiated agreement." 124 Cong. Rec. 25,777 (1978), *Legislative History* at 855-56. Where pay matters were not governed by statute, however, bargaining rights remained as they were under the executive order program.

In sum, Congress declined to extend bargaining rights to all employees, but preserved the bargaining rights of those employees previously entitled to bargain over pay. Congress carried forward the language of the executive orders that had allowed bargaining over pay where not provided for by statute. General statements regarding the lack of bargaining rights over pay refer to matters governed by statute for most workers. They cannot fairly be read to negate the affirmative evidence of con-

gressional intent to retain the bargaining allowed under executive orders for "policies and practices and matters affecting working conditions," including wages of the few employees not governed by statute.

E. Under This Statutory Scheme, It Is More Likely That Congress Would Have Specifically Excepted Pay, If It Did Not Intend For Pay Ever To Be Negotiated.

Finally, the Agency incorrectly asserts (Pet. Br. 26) that "common sense suggests that Congress would not authorize collective bargaining" over something so major as compensation, without expressly listing wages as negotiable. On the contrary, given the structure of the CSRA and its predecessor executive orders, and the provision of pay by statute for all but a few federal employees, "common sense suggests" that Congress would have specifically excluded pay for all, if it had so intended.

It is not surprising that Congess followed the lead of Presidents Kennedy and Nixon by not including the word "wages" when defining negotiable matters. Wages had never been expressly referenced before, and yet the reference to personnel policies and practices and matters affecting working conditions had always been interpreted to encompass compensation. So, too, Congress used the broad, generic phrase "conditions of employment," defining it in the same language used in the executive orders. It intended this phrase to be "expansively defined." *EEOC v. FLRA*, 744 F.2d at 845.

Moreover, the statute does not list *any* examples of conditions of employment subject to collective bargaining. Under this particular statutory scheme, only those matters that are excluded from incidents of employment are listed: *i.e.*, matters relating to prohibited political activities, to classifications and to matters provided for by Federal statute. 5 U.S.C. 7103(a)(14). Congress did not exclude all pay matters, as it could easily have done, but

rather excluded only pay and other issues "specifically provided for by Federal statute." *Id.*

Despite this statutory scheme and historical context, the Agency believes that pay should have been expressly referenced, perhaps because it wrongly believes that wages of large numbers of employees are not set by statute (*see* Pet. Br. 9 n.4).[3] In fact, however, the number of affected employees—those workers covered by the CSRA whose wages are not fixed by statute—is relatively few.

The Agency and the respondent union together are able to list very few federal employees who would be affected by the ruling here: the teachers and staffs at DOD dependent schools, such as those involved in this case and those overseas (20 U.S.C. 241; 901-07); faculty members at the U.S. Merchant Marine Academy (46 App. U.S.C. 1295g(d)); civilian mariners working for the Navy (5 U.S.C. 5348); electricians at the Bureau of Engraving and Printing (5 U.S.C. 5349(a)); and employees within bargaining units at the Federal Deposit Insurance Corporation (FDIC) (12 U.S.C. 1819) and the Nuclear

[3] The Agency also argues that the availability of impasse procedures somehow makes it more likely that Congress did not intend to allow any pay bargaining. Pet. Br. 26. It is true that Congress has authorized the Federal Service Impasses Panel to assist in resolving bargaining impasses, taking "whatever action is necessary and not inconsistent with [the CSRA] to resolve the impasse," including ordering the parties to adopt specific contract proposals, when all else fails. 5 U.S.C. 7119(c)(5)(B)(iii).

Panel decisions have consistently demonstrated, however, that the Panel examines the reasonableness of a contract proposal in considering whether its language should be adopted by the parties. *See Veterans Administration Medical Center, Tampa, Florida v. FLRA*, 675 F.2d 260, 265 n.9 (11th Cir. 1982). Moreover, judicial review of Panel decisions may be obtained through unfair labor practice procedures, pursuant to which "the courts may review the validity of the Panel order in question." *Council of Prison Locals v. Brewer*, 735 F.2d 1497, 1500 (D.C. Cir. 1984). There is no reasonable fear, therefore, that the Panel will order the adoption of improper pay proposals.

Regulatory Commission (NRC) (42 U.S.C. 2201(d)), which are represented by NTEU. The numbers of NTEU's bargaining unit employees at FDIC and NRC, at least, are small. Our latest figures indicate that there are 1,333 bargaining unit employees at FDIC and 1,950 at NRC.

The number of workers whose pay is not set by statute, therefore, is not so large as to make it likely that Congress would have departed from prior practice and specifically listed wages, when allowing such employees to negotiate over pay. Retaining the traditional inclusion of pay matters through the use of the phrase "conditions of employment" was perfectly reasonable.

Nor does the express reference to wages for certain "prevailing rate" employees in any manner suggest that Congress viewed wages as non-negotiable for all workers. *See* CSRA, Tit. VII, § 704, 92 Stat. 1218, *reprinted in* 5 U.S.C. 5343 note and *Legislative History* at 108. Certain skilled blue-collar workers traditionally negotiated over wages before 1972. When the Prevailing Rate Act was enacted in that year, it specified that most such skilled craftsmen were to receive "prevailing rates" for their jobs. 5 U.S.C. 5343. Section 9(b) of the Prevailing Rate Act, however, provided a "grandfather clause" to preserve the bargaining rights of the covered workers who negotiated over pay before 1972. 5 U.S.C. 5343 note. The Comptroller General nonetheless interpreted the Prevailing Rate Act as making the overtime provisions of 5 U.S.C. 5541-5550 applicable and thus beyond the scope of bargaining, even for the employees encompassed by the "grandfather clause." *Department of Interior*, 57 Comp. Gen. 259 (1978), *Legislative History* at 1137; *Department of Interior*, Comp. Gen. B-191520 (June 6, 1978), *Legislative History* at 1144.

In the CSRA, therefore, Congress decided both to continue the pay bargaining rights of the skilled craftsmen within the grandfather clause of the Prevailing Rate Act,

and to overturn the Comptroller General decisions, so as to allow such employees to bargain over all pay matters. *See* 124 Cong. Rec. 25,722 (1978), *Legislative History* at 857 (remarks of Rep. Ford); H.R. Rep. No. 1717, 95th Cong., 2d Sess. 159 (1978), *Legislative History* at 827.

For these reasons, Congress expressly provided that the craft employees who bargained over compensation before 1972 could continue to negotiate over "terms and conditions of employment and other employment benefits," including "pay and pay practices." CSRA, Tit. VII, § 704, 92 Stat. 1218, *reprinted in* 5 U.S.C. 5343 note and *Legislative History* at 108. To achieve its purpose, Congress had to include an express reference to pay. Nothing in section 704's language, however, suggests that pay is a "term" but not a "condition" of employment. The joint phrase "terms and conditions" was merely used, as it was in the NLRA, to describe all incidents of employment, including pay. *See supra* at 9-10.

In sum, nothing in the structure of the CSRA suggests that Congress would have departed from past practices and specifically mentioned pay, when allowing pay bargaining by those few employees whose wages are not set by statute.

II. PAY PROPOSALS DO NOT INTERFERE WITH AN AGENCY'S RIGHT TO DETERMINE ITS BUDGET UNDER 5 U.S.C. 7106(a)(1).

The Agency next argues that, even if wages are "conditions of employment" generally subject to negotiation, they should be excluded from collective bargaining as interfering with management's right "to determine the . . . budget . . . of the agency," under 5 U.S.C. 7106 (a)(1). This alternative argument, however, is flawed at its inception. If Congress intended workers whose pay is not set by statute to negotiate over wages, it certainly would not have intended that right to be barred through the back door, by virtue of the management right provision.

As the D.C. Circuit has pointed out, section 7106 "should not be interpreted to negate the Act's broad duty to bargain," but rather to protect only "'genuine managerial prerogatives,'" because Congress directed that the clause was "'to be read to favor collective bargaining whenever there is doubt as to the negotiability of a subject or a proposal.'" *EEOC v. FLRA*, 744 F.2d at 848-49, *quoting* 124 Cong. Rec. 29,199 (1978) (remarks of Rep. Ford), *Legislative History* at 956 and H.R. Rep. No. 1403, 95th Cong., 2d Sess. 44 (1978), *Legislative History* at 690. The FLRA, with judicial approval, has determined that section 7106 is contravened only where an agency has demonstrated that a union proposal would "directly interfere" with one of the specified management rights. *See Department of Defense v. FLRA*, 659 F.2d at 1159.

The FLRA's decisions concerning the scope of an agency's right to determine its budget reflect an appreciation of the statutory balance struck between Congress' objective of expanding collective bargaining and its intent also to protect "genuine managerial prerogatives." Thus, the FLRA has rejected the position that a union proposal interferes with an agency's right to determine its budget simply because the proposal would impose additional costs. "Such a construction of the Statute," the FLRA reasons, "could preclude negotiation on virtually all otherwise negotiable proposals, since, to one extent or another, most . . . would require the expenditure of appropriated agency funds. Nothing in the relevant legislative history indicates that Congress intended the right of management to determine its budget to be so inclusive as to negate in this manner the obligation to bargain." *American Federation of Government Employees, AFL-CIO and Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio*, 2 F.L.R.A. 604, 607 (1980) (*Wright-Patterson*). Indeed, the D.C. Circuit has held that an agency cannot rely on monetary considerations—or even economic hardship—

as a reason for releasing it from its duty to bargain. *American Federation of Government Employees, AFL-CIO v. FLRA*, 785 F.2d 333, 337-38 (D.C. Cir. 1986).

The FLRA has established a two-part test for determining whether a proposal infringes on an agency's right to set its budget. This test considers whether 1) whether a proposal prescribes agency programs or specific amounts of money to fund programs; and 2) whether agency management has shown that the proposal unavoidably causes a significant increase in costs that is not offset by compensating benefits. *Wright-Patterson*, 2 FLRA at 608. As the Eleventh and Second Circuits have recognized, the pay proposals at issue here, which do not prescribe a particular amount of money for salaries, meet the reasonable and consistently applied *Wright-Patterson* test. Pet. App. 19a-20a; *West Point Elementary School Teachers Ass'n*, 855 F.2d at 943-944.

The Agency does not seem to take issue with the first part of the *Wright-Patterson* test, which is met here because the proposal does not prescribe a program or specific amounts of money for a program. *See* Pet. Br. 28. Certainly, a pay proposal that merely sets a formula by which salaries would be adjusted, while management retains control over the number and distribution of employees and specific amounts to be applied to programs, is not objectionable simply because it will lead to an expenditure of money. Such a construction would mean that management's budget right would swallow the rule favoring bargaining rights because virtually all proposals have attendant costs.[4]

[4] The Agency does object to the lower court's conclusion that the specific pay proposals at issue would not significantly affect the Army's enormous budget. Despite the clear statutory language preserving management's right to determine the budget "of the agency" (section 7106(a)(1)), management wants the proposal to be considered solely in light of expenditures of the program employing the affected workers rather than of the agency as a whole

Similarly, the Agency does not challenge the FLRA's test requiring a significant budgetary increase before a proposal is deemed to interfere with the budget right. *See* Pet. Br. 28. Rather, the Agency objects only to the FLRA's requirement that management show that any significant increase in cost would not be offset by compensating benefits—a challenge based on the theory that an agency's weighing of costs versus benefits lies at the heart of the budget process. *Id.*

If the Agency's theory is correct, however, then management should routinely be able to produce evidence of a cost-benefit analysis and has nothing to fear so long as its analysis is rational. The problem arises, for employees and their unions, when agencies peremptorily reject a proposal bearing cost implications while refusing to produce any evidence that management actually has studied the question and reasonably concluded that cost truly outweigh the benefits to be derived from the proposal. In those circumstances, management should certainly not be allowed to escape bargaining through incantation of its mystical budgetary powers.

For example, an agency must not be allowed to hide behind the budget right where it fails to address the issue of compensatory benefits. *See Nuclear Regulatory Commission v. FLRA*, 859 F.2d 302, 312 (4th Cir.), *rev'd*, 879 F.2d 1225 (4th Cir. 1989) (en banc), *petitions for cert. pending*, Nos. 89-108, 89-562. The FLRA test prevents such behavior and insures that an agency will not ignore compensating benefits to be derived from a pay proposal, including increased productivity, reduced turnover, and improved employee performance.

This requirement is particularly appropriate in a field, such as education or science, where there is great competi-

(Pet. Br. 28-30). In any event, the Agency's complaints about the allegedly great cost of the specific pay proposals in this case have weight, if at all, only in the context of labor-intensive fields, such as education.

tion from the private sector for trained and experienced employees. Indeed, Congress has given the NRC authority to depart from the GS pay system precisely because of the difficulty of securing the employment of qualified scientists, technicians and other workers in the field. *See* 42 U.S.C. 2201(d). An agency must not be allowed to reject a pay proposal out-of-hand; it is completely warranted for the FLRA to require management to show that a proposal is unjustified under a sound cost-benefit analysis.

III. PAY BARGAINING IS CONSISTENT WITH AGENCY AUTHORITY WHERE A STATUTE GIVES THE AGENCY A SIGNIFICANT DEGREE OF DISCRETION TO SET WAGES.

The Agency's third argument is that the specific pay proposals here conflict with an agency rule for which there is a "compelling need," within the meaning of 5 U.S.C. 7117(a)(2). The precise question here is whether there is a "compelling need" for a particular Army regulation. That regulation interprets a statute that requires education at dependents schools to be provided, "[t]o the maximum extent practicable" at a per-pupil cost equal to that in the local schools. 20 U.S.C. 241 (e). The Army regulation provides that education in the dependents schools will be deemed comparable to local public education when various factors, including "salary schedules," are "to the maximum extent practicable, equal." Army Reg. 352-3, 1-7 (h) (1980).

When considering the "compelling need" for the Army regulation under 5 U.S.C. 7117(a)(2), the Court will be examining the type of authority Congress gave the Army to set the pay of the particular employees here. This is the same type of analysis that must be made in cases where the issue is whether a pay proposal is "inconsistent with" a statute allowing an agency to set wages. *See* 5 U.S.C. 7117(a)(1). In both situations, the basic question is whether the agency has sufficient statutory discretion to bargain over pay.

The Agency here seems to argue that pay bargaining is barred unless management has virtually unfettered discretion to set wages. In the Agency's view, pay bargaining would be prohibited even without the regulation at issue, because the authorizing statute directs the Army Secretary to limit per-pupil costs to such costs in local public schools, "to the maximum extent practicable." Pet. Br. 32-33. This position, however, is an extreme one that would prohibit pay bargaining where Congress has provided relatively vague guidelines to govern an agency's authority to set pay. Once again, therefore, the Agency is advocating a reading that would negate Congress' decision to allow pay bargaining by the few employees whose pay is not actually "provided for by Federal statute."

Moreover, the Agency's position conflicts with the rationale of the FLRC holdings discussed above, which Congress implicitly adopted. In *Overseas Education Ass'n and Department of Defense Dependents Schools*, the FLRC allowed bargaining over pay matters for teachers at dependents schools, where the applicable statute, similar to the one in this case, directed that basic compensation for ODS teachers was to be calculated on a parity with such compensation for teachers in the United States. Such a limitation on the agency's authority, requiring it to achieve parity with another pay structure, did not prohibit the agency from bargaining over pay matters under the executive order program. 6 F.L.R.C. at 232-33. The FLRC decision in *United Federation of College Teachers Local 1460 and U.S. Merchant Marine Academy* is to the same effect. A statute requiring salary scales at the Merchant Marine Academy to be "similar" to those of the U.S. Naval Academy did not render compensation non-negotiable. 1 F.L.R.C. at 212.

In any event, however, even if pay bargaining could be held prohibited in this case because of the particular statute here, such bargaining would not be prohibited where a law gives an agency even wider discretion to set its em-

ployees' wages. The statute here directs that dependents schools' costs be tied to costs at local schools, "to the maximum extent practicable." 20 U.S.C. 241(e). Congress, however, has provided different degrees of discretion over pay in other statutes.

For example, pursuant to section 161(d) of the Atomic Energy Act, the NRC made a unilateral decision in 1975 that it was "necessary to the discharge of its responsibilities" to opt out of the Classification Act and set the wages of its personnel. *See* 42 U.S.C. 2201(d); *Nuclear Regulatory Commission v. FLRA*, 879 F.2d at 1233. Having thus exempted its employees from the GS pay system because of private sector competition, the question becomes how bargaining over a proposal to make salaries comparable to those in the private sector could conflict with the NRC's statutory discretion.

In other words, the precise extent to which an agency has discretion to set wages under a particular statute is all important in assessing the availability of pay bargaining under either 5 U.S.C. 7117(a)(1) or 7117(a)(2).

CONCLUSION

For these reasons, the rulings below should be affirmed.

Respectfully submitted,

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ADDENDA

ADDENDUM A

National Agreement Between National Treasury Employees Union and Internal Revenue Service, National Office, Regions and Districts, NORD III, Doc. 6647 (Rev. 7-89)

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IN THE
Supreme Court of the United States
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FORT STEWART SCHOOLS,
Petitioner,

v.

FEDERAL LABOR RELATIONS AUTHORITY and
FORT STEWART ASSOCIATION OF EDUCATORS,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, THE AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, AND THE AMERICAN FEDERATION OF TEACHERS, AFL-CIO AS AMICI CURIAE SUPPORTING RESPONDENTS

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This brief *amici curiae* is filed with the consent of the parties, as provided for in the Rules of the Court.

INTEREST OF THE AMICI CURIAE

The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") is a federation of 90 national and international unions with a total

membership of approximately 14 million working men and women, including many federal employees whose compensation is not specifically set by statute and who are therefore directly affected by the issues presented in this case. The American Federation of Government Employees, AFL-CIO ("AFGE") and the American Federation of Teachers ("AFT") are the national unions affiliated with the AFL-CIO which primarily represent federal employees and educational employees, respectively.

ARGUMENT

Introduction and Summary of Argument

It is common ground in this case that the vast majority of nonpostal federal employees[1] and their unions have had no right, either before or after the enactment of the Federal Service Labor-Management Relations Statute,[2] to bargain on the subject of compensation.[3] Instead, compensation for those employees has been set by Congress, through such instrumentalities as the familiar General Schedule wage scales, *see* 5 U.S.C. 5332. Thus for most federal employees compensation is "specifically provided for by Federal statute," 5 U.S.C. 7103 (a) (14) (C), and for that reason is *not* subject to bargaining, *id.*

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[1] Postal employees are subject to a separate statutory scheme. In this brief all references to "federal employees" are to nonpostal employees, unless otherwise indicated.

[2] Title VII of the Civil Service Reform Act of 1978, 5 U.S.C. 7101 *et seq.* ("FSLMR Statute" or "the Statute").

[3] Throughout this brief we will use the terms "compensation," "wages," "pay" and their synonyms interchangeably. And, we will not distinguish among the three separate proposals of the respondent Fort Stewart Association of Educators ("the Association") that are at issue here. This is not to say that such distinctions might not become relevant depending on how certain of the issues presented are resolved.

But it is also undisputed that there are certain categories of federal employees, including those involved in this case, whose compensation historically has *not* been set by statute. Prior to the enactment of the FSLMR Statute, if such employees were represented by a union the employing agency could *not*, as a general matter, unilaterally set their wages; the agency had a duty to bargain with respect to compensation just as it did with respect to other matters. *See infra* at 14.

After the enactment of the Statute, it remains the case that Congress does not set the pay for these limited categories of employees. Accordingly, the question presented in this case is whether as a result of the enactment of the FSLMR Statute the compensation of these employees is to be set not by bargaining (as was the case before enactment), nor by Congress (as has historically been the case for those federal employees whose pay has not been determined through bargaining), but by the unilateral action of the employing agency.

In arguing that the FSLMR Statute should be construed to produce that result, petitioner advances an extraordinarily constricted view of the permissible scope of bargaining under the Statute. First, petitioner asserts that bargaining is never permitted with respect to anything but "the physical aspects of the working environment." Pet. Br. at 14. Second, even as to matters in that narrow range, petitioner asserts that bargaining is foreclosed if a union proposal would result in any "significant increase in the cost of operating [the specific agency program affected by the proposal]." *Id.* at 15. *See also id.* at 28 ("a proposal is . . . barred [if] it has more than a *de minimis* budgetary effect"). And finally, as if the two points just stated would not suffice to kill the beast, petitioner urges an expansive reading of the statutory provision that relieves an agency of the duty to bargain with respect to any matter dealt with by an agency regulation for which there is a "compelling need." *See id.* at 31-36.

We show in this brief that petitioner's construct is worlds away from what Congress intended when the Legislature, animated by the principle that "collective bargaining in the civil service [is] in the public interest," 5 U.S.C. 7101(a), enacted the FSLMR Statute.

In Part I we show that compensation is a "condition of employment" which, when not specifically fixed by statute, is a proper subject for bargaining under the FSLMR Statute.

In Part II we show that management's right "to determine the . . . budget . . . of the agency," 5 U.S.C. 7106(a)(1), does not prohibit bargaining merely because a proposal may be costly, but only prohibits bargaining over the agency's budget *as such*.[4] The bargaining proposals at issue here do not run afoul of that proscription.

Finally, in Part III we show that 5 U.S.C. 7117(a)(2), which allows an agency to refuse to bargain over a matter contained in an agency regulation for which there is a "compelling need," was intended by Congress to be construed narrowly, and that the claim of "compelling need" advanced here by petitioner cannot survive under the congressionally prescribed standard.

I. COMPENSATION THAT IS NOT SPECIFICALLY SET BY STATUTE CONSTITUTES A CONDITION OF EMPLOYMENT AS TO WHICH BARGAINING IS REQUIRED UNDER THE FSLMR STATUTE

With certain specified exceptions, the Federal Service Labor-Management Relations Statute places on federal agencies an obligation to bargain with their employees who have chosen a union representative with respect to

[4] When we refer in this brief to bargaining that is "foreclosed" or "prohibited" by the Statute, or when we describe a matter as "nonbargainable," we simply mean that bargaining is not *mandated* by the Statute, and that no bargaining will take place if management chooses not to bargain.

all "conditions of employment."[5] Again with certain specified exceptions, the term "conditions of employment" is defined broadly to include "personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions." 5 U.S.C. 7103(a)(14).

A. Starting, as we must, with "the assumption that the legislative purpose is expressed by the ordinary meaning of the words used," *Mississippi Band of Choctaw Indians v. Holyfield*, 109 S. Ct. 1597, 1607 (1989), *quoting Richards v. United States*, 369 U.S. 1, 9 (1962), it is evident that "conditions of employment" encompasses wages and other economic benefits of employment. A "condition" is "something established or agreed upon as a requisite to the doing or taking effect of something else." *Webster's Third New International Dictionary* 473 (1986). Given the economic arrangements in this society it is an understatement to say that the fact—and the quantum—of compensation is a "requisite" to an employee's accepting or continuing "employment," or to his "working." Furthermore, when used in the plural the word "conditions" refers broadly to the "attendant circumstances" or "existing state of affairs" respecting a matter. *Id.* An employee's compensation is certainly one of the "attendant circumstances" or the "existing state of affairs" respecting his "employment" or his "working."

There is consequently no basis for petitioner's assertion that "[t]he phrase 'conditions of employment' suggests the physical aspects of the working environment, not com-

[5] *See* 5 U.S.C. 7102(2) (employees have the right "to engage in collective bargaining with respect to conditions of employment"); 5 U.S.C. 7103(a)(12) ("'collective bargaining' means the performance of the mutual obligation of the representative of an agency and the exclusive representative of employees . . . to . . . bargain in a good-faith effort to reach agreement with respect to the conditions of employment affecting such employees"); 5 U.S.C. 7114(b)(2) ("[t]he duty of an agency and an exclusive representative to negotiate in good faith . . . shall include the obligation . . . to be . . . prepared to discuss and negotiate on any condition of employment").

pensation." Pet. Br. at 14. That extraordinarily narrow definition not only conflicts with the plain meaning of the statutory words, but is belied by 5 U.S.C. 7103 (a)(14)(B). That provision of the FSLMR Statute excludes "the classification of any position" from the mandatory subjects of collective bargaining. Congress thus evinced its understanding that without such a proviso the terms "conditions of employment" and "working conditions" would encompass "matters relating to the classification of any position." *See* 124 Cong. Rec. 29183 (1978) (statement by Representative Udall, the author of this provision, explaining that "the effect of this new exclusion would be to remove the classification of positions from collective bargaining"). The classification of a position is *not* one of "the physical aspects of the working environment," Pet. Br. at 14. And if position classification is a "condition of employment" within the meaning of the statute (or, more precisely, if that would be the case but for the express exception in Section 7103(a)(14)(B)), there is no basis for asserting that wages are not likewise a condition of employment.

B. To construe the phrase "conditions of employment" as including compensation is consistent with Congress' usage in other provisions of the Civil Service Reform Act ("CSRA") (The FSLMR Statute, as we have seen, is Title VII of that Act.). In Title IV of the CSRA, dealing with federal employees in the Senior Executive Service, Congress provided for "a *compensation* system, including salaries, benefits, and incentives, *and for other conditions of employment*." 5 U.S.C. 3131(1) (emphasis added).[6]

[6] Petitioner refers to 5 U.S.C. 3131(1) as part of what is denominated as the "Senior Executive Service Act;" and petitioner seeks to dismiss that "Act" as a "relatively obscure statute[]." Pet. Br. at 19 n.9. But the fact of the matter is that 5 U.S.C. 3131(1) is part of Title IV ("Senior Executive Service") of the *Civil Service Reform Act itself*, see 92 Stat. 1154 (1978); and Title IV was viewed by Congress as "one of the most significant elements of the Civil Service Reform Act," S. Rep. No. 969, 95th Cong., 2d Sess. 67 (1978).

That provision plainly expresses the understanding that the term "conditions of employment" includes "compensation." "The normal rule of statutory construction assumes that identical words used in different parts of the same act are intended to have the same meaning." *Sorenson v. Secretary of Treasury*, 475 U.S. 851, 860 (1986) (citations omitted).

In other statutes as well, Congress has evinced the understanding that compensation is a "condition of employment."[7] For example, 18 U.S.C. 4082(c)(2)(iii) provides for "*the rates of pay and other conditions of employment*" (emphasis added), for federal prisoners on work-release. So too, Section 9(a) of the National Labor Relations Act provides for bargaining "in respect to *rates of pay, wages*, hours of employment, *or other conditions of employment*," 29 U.S.C. 159(a) (emphasis added), and the syntax of that phrase makes it apparent that "rates of pay, wages, [and] hours" are all examples of "conditions of employment."[8] Similarly, the preamble to the NLRA refers to "the friendly adjustment of industrial disputes arising out of differences as to *wages*, hours *or other working conditions*." 29 U.S.C. 151 (emphasis added).

The lesson to be drawn from these statutes is that the phrase "conditions of employment" is understood by Congress to include wages. Petitioner would have it otherwise, and points to certain other statutory provisions which, according to petitioner, use the phrase in a nar-

[7] In ascertaining the meaning of particular words as used in one statute it is of course appropriate to consider how the same words have been used in other statutes, as long as proper regard is given to the specific contexts in which the words have been used. *See generally, e.g., Gwaltney of Smithfield v. Chesapeake Bay Foundation*, 108 S. Ct. 376, 381 (1987).

[8] If, as petitioner suggests, Br. at 18 n.8, Congress meant only to refer to *hours* as conditions of employment, the phrase would have read "rates of pay, wages, or hours of employment and other conditions of employment."

rower sense. Those provisions do *not* support petitioner's argument.

Petitioner refers, for example, to Section 8(d) of the NLRA, which provides that the duty to bargain under that Act applies with respect to "wages, hours, and other terms and conditions of employment." According to petitioner, "[t]he symmetry of the phrase suggests that wages were thought to be a 'term' and hours a 'condition' of employment." Pet. Br. at 18 n.8. That is nonsense. Section 8(d), enacted in 1947, clarifies the nature of the NLRA duty to bargain, and Section 9(a), enacted in 1935, defines an NLRA union's exclusive *authority* to bargain. Given the relationship between the two provisions, the "conditions of employment" encompassed by Section 9(a) are necessarily coextensive with the "terms and conditions of employment" encompassed by Section 8(d), or else the statute would have no internal logic: NLRA unions would not have any *authority* to bargain about "terms" of employment (because the grant of authority in Section 9(a) refers only to "conditions," not "terms"), yet NLRA unions and employers would have a *duty* to bargain about "terms" as well as "conditions" (Section 8(d)).

Petitioner's theory that there is a crucial difference between "terms" and "conditions" founders for another, simplier reason as well: one of the *synonyms* for the word "condition" is "term." *Webster's Third New International Dictionary*, *supra* at 473 ("TERM, used in the plural in this sense, indicates conditions offered or agreed to in a contract, deal, or agreement.") Thus, where Congress has used the two words together the conjunction is for emphasis, and does not suggest that the Legislature ascribes different meanings to the words. *Compare Pipefitters v. United States*, 407 U.S. 385, 421-26 (1972) (terms "separate" and "segregated" in phrase "separate segregated fund" used as synonyms for emphasis rather than with distinct meanings).[9]

[9] It is therefore not surprising that even though the FSLMR Statute refers to "conditions of employment" and does not use the word "terms," the legislators referred to the bargaining obligation as encompassing "terms and conditions" of employment, 124 Cong. Rec. 25721 (1978) (Representative Ford), and this Court has similarly stated that "[i]n general, unions and federal agencies must negotiate over terms and conditions of employment." *Bureau of Alcohol, Tobacco & Firearms v. FLRA*, 464 U.S. 89, 92 (1983). *See also FLRA v. Aberdeen Proving Ground*, 108 S. Ct. 1261 (1988) (FSLMR Statute "requires that federal agencies and labor organizations bargain in good faith concerning the terms and conditions of employment").

Petitioner also seeks to make much of the fact that the Postal Reorganization Act refers to a right to bargain over "wages, hours, and working conditions," 39 U.S.C. 1201 note. Petitioner states that Congress "thus distinguished between 'wages' and 'working conditions.'" Pet. Br. at 18. But if that were so, it would follow that Congress likewise distinguished between "*hours*" and "working conditions." Yet petitioner appears to accept that "hours" are "working conditions;" if not, 5 U.S.C. 7103(a)(14) would exclude every issue concerning hours of work from bargaining under the FSLMR Statute, and even petitioner does not reach for that proposition. It is therefore apparent that nothing can be inferred from the fact that Congress referred in the Postal Reorganization Act to "wages, hours, and working conditions" rather than to "wages, hours, and *other* working conditions." Indeed, nothing turned on whether the word "other" was or was not used in that provision: under either formulation, "wages" would be subject to bargaining, and all "working conditions" would be subject to bargaining.

Nor is it the case, as petitioner asserts, that Congress "has always specifically mentioned compensation when it intends to authorize wage bargaining." Pet. Br. at 17-18. For example, the Norris-LaGuardia Act states that the public policy of the United States is that employees should be free, through their designated representatives, "to negotiate the terms and conditions of [their] employment." 29 U.S.C. 102. Although wages are not specifically mentioned in that statute, no one would deny that wage bargaining was included in—indeed, was central to—the

bargaining Congress sought to encourage in the quoted provision of the Norris-LaGuardia Act. Furthermore, unlike the statutes to which petitioner refers which mention "wages" as being among the subjects for bargaining, in the FSLMR Statute Congress did not identify *any* specific subjects of bargaining, but simply used the generic terms "conditions of employment" and "working conditions." It does not follow from this that wages are excluded from bargaining, any more than it follows that the various other subjects, such as hours of work, that are specifically mentioned in the other statutes cited by petitioner but not in the FSLMR Statute are excluded.

C. To construe the Statute as allowing wage bargaining where the pay of federal employees is not specifically set by statute is consistent not only with the Statute's language but with its animating premises and purposes. Congress declared in no uncertain terms that "collective bargaining in the civil service [is] in the public interest," because, *inter alia*, such bargaining "safeguards the public interest . . ., contributes to the effective conduct of public business, and . . . facilitates and encourages the amicable settlement of disputes between employees and their employers involving conditions of employment." 5 U.S.C. 7101(a). In enacting the bargaining provisions of the FSLMR Statute "Congress unquestionably intended to strengthen the position of federal unions and to make the collective bargaining process a more effective instrument of the public interest." *Bureau of Alcohol, Tobacco & Firearms v. FLRA*, 464 U.S. 89, 107 (1983).[10]

[10] Petitioner asserts that federal sector wage bargaining, with the possibility that contract terms may be imposed by the Federal Services Impasse Panel, *see National Federation of Federal Employees v. FLRA*, 789 F.2d 944 (D.C. Cir. 1986), would "effect a 'withdrawal of political accountability.'" Pet. Br. at 26, *quoting Nuclear Regulatory Commission v. FLRA*, 879 F.2d 1225, 1231 (4th Cir. 1989), *petition for cert. pending*, Nos. 89-198 and 89-562. The difficulty with this assertion is that it reduces the Statute to a nullity; the same argument could be made as to federal sector bargaining on *any* subject. What petitioner calls a "withdrawal of political accountability" *Congress* called good faith collective bargaining, which the Legislature sought to encourage.

To be sure, Congress determined that the scope of bargaining should not be unlimited; but Congress was explicit in fashioning the limitations the Legislature deemed appropriate. Thus, Congress excluded certain subjects, such as position classification, from the scope of bargaining, 5 U.S.C. 7103(a)(14), *see supra* at 6; placed restrictions on bargaining over "management rights," 5 U.S.C. 7106, *see infra* at 21-25; provided that the right to bargain would not extend to "matters . . . specifically provided for by Federal statute," 5 U.S.C. 7103(a)(14)(C), *see supra* at 2; and specified the extent to which bargaining would be required with respect to matters that are the subject of rules or regulations, 5 U.S.C. 7117, *see infra* at 25-26.

In contrast, Congress did not explicitly exclude compensation from the scope of bargaining. Where, as in this case, wage bargaining would not run afoul of any of the specific limitations and exclusions fashioned by Congress, there is simply no reason to believe that the Legislature intended to foreclose such bargaining.[11] Indeed, given Congress' firm declaration that federal employee bargaining serves the public interest and should be encouraged, the appropriate presumption is that in the absence of any clear provision to the contrary, bargaining over wages should be permitted. As Representative Ford, quoting the earlier House Report, stated with respect to the "man-

[11] It must be recalled that in this setting the alternative to bargaining is not a congressionally-determined compensation structure, as in the usual case where federal employees are not allowed to bargain over wages, but a compensation scheme established unilaterally by the employing agency. *See supra* at 3. There is not the slightest hint that the Congress that wished to encourage "the amicable settlement of disputes" through bargaining, 5 U.S.C. 7101(a), sought to bring about such a regime of unilateral agency action for any federal employees. *See infra* note 23.

agement rights" provision, the FSLMR Statute should "be read to favor collective bargaining whenever there is doubt as to the negotiability of a subject or proposal." 124 Cong. Rec. 29198 (1978), *quoting* H.R. Rep. No. 1403, 95th Cong., 2d Sess. 44 (1978).[12]

D. There is all the more reason to construe the term "conditions of employment" in the FSLMR Statuate as including compensation because the Statute's definition of that term was drawn essentially verbatim from Executive Order 11491, *where the same language had been construed to include compensation as a proper subject for bargaining.*

The Executive Orders dealing with federal labor-management relations had their genesis in a 1961 Presidential Task Force report. That report, after noting that "[t]he employer in most parts of the Federal Government cannot negotiate on pay, hours of work or most fringe benefits" because "[t]hese are established by law," [13] recommended that in designing a new federal labor-management relations program the scope of bargaining might be defined to include such matters as "the work environment," "grievance procedures," "and *where permitted by law* the implementations of policies relative to *rates of pay* and

[12] Petitioner therefore gets it backward in arguing that "clear evidence" of an intent to authorize wage bargaining should be required. *See* Pet. Br. at 27. Petitioner's contention that clear evidence should be required because "wages and fringe benefits lie at the core of collective bargaining in the private sector," *id* at 14, 26, is particularly mystifying. Petitioner fails to explain the logic by which Congress, with its strong endorsement of collective bargaining, *see supra* at 10, should be presumed to disfavor "the core" of that process.

[13] President's Task Force on Employee-Management Relations in the Federal Service, *A Policy for Employee-Management Cooperation in the Federal Service* (1961), reprinted in House Comm. on Post Office and Civil Service, Subcomm. on Postal Personnel & Modernization, 96th Cong., 1st Sess., *Legislative History of the Federal Service Labor-Management Relations Statute* (Comm. Print 1979) (hereinafter "Leg. Hist.") at 1177, 1200.

job classification." [14] President Kennedy praised the Task Force report, stating that "[i]ts recommendations will provide an effective system for developing improved employee-management relations," and he directed "that an Executive Order giving effect to the Task Force recommendations be prepared." Leg. Hist. 1178. In describing those recommendations, the President specifically noted the Task Force's statement that "*where salaries* and other conditions of employment *are fixed by Congress* those matters are not subject to negotiation." *Id.* (emphasis added).[15]

The Executive Order that ensued defined the subjects for bargaining as "personnel policy and practices and matters affecting working conditions." [16] By 1969 the language had been put into the form in which it remained up to the enactment of the Federal Service Labor-Management Relations Statute, by changing the word "policy" to "policies." *See* E.O. 11491, § 11(a) (Oct. 29, 1969), reprinted in Leg Hist. at 1250. That is precisely the formulation that Congress enacted into law as the definition of bargainable "conditions of employment" in § 7103 (a)(14) of the Statute, except that Congress dropped one of the two "and"s and inserted the phrase "whether established by rule, regulation, or otherwise" to modify the phrase "policies, practices, and matters"; changes which,

[14] Id. at 1201 (emphasis added).

[15] It should be noted that President Kennedy's statement provides yet another instance in which "salaries" are referred to as a "condition of employment."

[16] Executive Order 10988 (1962), § 6(b), reprinted in Leg. Hist. at 1214. The pertinent portion of § 6(b) stated as follows:

> The agency and [union] . . . shall meet at reasonable times and confer with respect to personnel policy and practices and matters affecting working conditions, so far as may be appropriate subject to law and policy requirements. This extends to the negotiation of an agreement. . . . [*Id.*]

if anything, broadened the provision, but did not alter the sense of the words.

Construing these very words in the Executive Order, the Federal Labor Relations Council had specifically held that wage proposals were "negotiable as 'personnel policies and practices and matters affecting working conditions' under section 11a(a) of the Order." *United Federation of College Teachers, Local 1460 and U.S. Merchant Marine Academy*, 1 F.L.R.C. 211, 218 (1972). *Accord, Overseas Education Association, Inc. and Department of Defense Dependents Schools*, 6 F.L.R.C. 231 (1978). Thus the following principle is applicable: "where, as here, Congress adopts a new law incorporating sections of a prior law [in this case, an Executive Order], Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute." *Lorillard v. Pons*, 434 U.S. 575, 581 (1978).[17]

That presumption is "particularly appropriate" where Congress "exhibited both a detailed knowledge of the [prior] provisions and their judicial interpretation and a willingness to depart from those provisions regarded as undesirable or inappropriate for incorporation." *Id.* That is certainly true of the FSLMR Statute. The process of developing the Statute consisted, in essence, a series of decisions by Congress as to which provisions of the Executive Order would be retained, which would be discarded, and which would be modified. *See, e.g.*, 124 Cong. Rec. 25720 (Representative Clay), 25721 (Representative Ford), 29198 (Representative Ford); H.R. Rep.

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[17] *See also Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 108 S. Ct. 1704, 1711-12 (1988) ("We generally presume that Congress is knowledgeable about existing law pertinent to the legislation it enacts."); *Albernaz v. United States*, 450 U.S. 333, 341 (1981); *Cannon v. University of Chicago*, 441 U.S. 677, 696-98 (1979).

No. 1403, *supra* at 44.[18] The provision requiring agencies to bargain with respect to "working conditions," which had been construed to encompass bargaining over compensation, was one of the provisions Congress decided to retain.[19]

E. Nor does the legislative history evince any intent to cut back on the wage bargaining that was permitted by the Executive Order, or to preclude bargaining where wages are not specifically set by statute. To the contrary, Congress did not intend to "be narrowing the preexisting collective bargaining practices of any group of Federal employees." 124 Cong. Rec. 25722 (1978) (Representative Ford).

1. Petitioner asserts that "Congress twice rejected proposals to make pay negotiable." Pet. Br. at 20. Neither of those so-called "rejections" lends any support to petitioner's position.

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[18] Some provisions bearing on the scope of bargaining, such as the "management rights" provision, were extensively rewritten. *See* the legislative history just cited, and compare the management rights provision of the Executive Order, Leg. Hist. 1346, with 5 U.S.C. 7106 as enacted.

[19] We do *not* suggest that all FLRC interpretations of the Executive Order are, *per se*, controlling under the Statute. *See Bureau of Alcohol, Tobacco & Firearms*, 464 U.S. at 103 n.13. In particular, Congress was concerned that the FLRC, a "part-time management-oriented [body]," 124 Cong. Rec. 29187 (1978) (Representative Clay), had *unduly restricted* the scope of bargaining in some of its decisions. *Id.*; *see also id.* at 29198 (Representative Ford). (The FLRC consisted of the Secretary of Labor, the Chairman of the Civil Service Commission, and the Director of the Office of Management and Budget, "none of whom can be considered neutral." *Id.* at 25721 (Representative Ford).) But we are not aware of any respect in which Congress concluded that the FLRC had allowed *too great* a scope of bargaining. To the contrary, Congress' purpose (accomplished, by example, in the narrowing of the Executive Order's management rights provision, *see supra* note 18) was to allow for a *broader* scope of bargaining than had prevailed under the Order. *See* 124 Cong. Rec. 29187 (Representative Clay), 29198 (Representative Ford).

a) The bill introduced by Congressman Ford (H.R. 9094) to which petitioner refers, Br. at 20, would have revolutionized federal pay practices by providing that "[the] pay and benefits of each statutory pay and benefits system," Leg. Hist. 263-64—including, for example, the GS schedule—would be determined through the recommendations of a government-wide labor-management Federal Employees Pay and Benefits Committee, *id.* at 264-67, 272-73, culminating, in the event of disagreement, in arbitration before an Arbitration Board on Federal Employees Pay and Benefits, *id.* at 265-68, 273-75.[20] Congress' failure to enact such a novel and sweeping proposal carries no implications for the issue presented here.

b) Equally disingenuous is petitioner's assertion that "in the House committee markup, Representative Heftel unsuccessfully introduced a more limited proposal that would have extended the obligation to negotiate to 'pay practices' and 'overtime practices' so far as 'consonant with law and regulation.'" Pet. Br. at 20-21.

In reality, the provision proposed by Representative Heftel *enumerated eleven specific matters* which the obligation to negotiate "includes, but is not limited to." Leg. Hist. 1087. The subjects so listed included not only "pay practices," but also such matters as "safety and health" and "grievance and arbitration procedures," *id.* at 1087-88; and the proposed provision stated that agreements as to *any* negotiable matter had to be "consonant with law and regulation," *id.* at 1088. The fact that Congress did not adopt this provision (which is nowhere discussed in the legislative history) no more evinces an intent to disallow bargaining over pay practices than an intent to disallow bargaining over safety and health, grievance and arbitration procedures, or any of the other *concededly bargainable* subjects that were enumerated in Represent-

[20] This proposed system is what Congressman Ford was referring to when he mentioned H.R. 9094's "provision for the negotiation of pay," 124 Cong. Rec. 25721 (1978).

ative Heftel's draft.[21] The most reasonable explanation for Congress' failure to adopt the Heftel approach—or more precisely, for Congress' failure to adopt *any* provision listing specific examples of negotiable matters—is that the term "conditions of employment" was thought to be both broad enough and clear enough to convey the congressional intent without the need for a list of examples. In other words, in Congress' view such a list was "unnecessary," *cf. United States v. Wells Fargo Bank*, 108 S. Ct. 1179, 1184 (1988). Indeed, Congress may have understood as well that any effort to compose such an enumeration would have been ill-advised because of the difficulty of producing a sufficiently all-encompassing list.

2. Nor do the statements from the legislative reports and debates that are cited by petitioner, Br. at 21-23, support the contention that the Statute was intended to extinguish wage bargaining in the contexts where it had been permitted by the Executive Order, *viz.*, where wages are not specifically fixed by statute. To be sure, there are some broad statements in the legislative history to the effect that the FSLMR Statute does not create an obligation to bargain about wages. But two important themes run through those statements: first, that in this area the statute would continue prior law; and second, that the

[21] Safety and health is presumably the paradigm negotiable subject in petitioner's view, as it involves "the physical aspects of the working environment," Pet. Br. at 14. As for grievance and arbitration procedures, not only are they negotiable, but the Act states that any collective bargaining agreement *must* provide for such procedures. 5 U.S.C. 7121(a)(1).

The provision proposed by Representative Heftel, like the bill ultimately enacted, provided that the duty to bargain applied "with respect to personnel policies and practices and matters affecting working conditions." Leg. Hist. 1087. Thus, all of the eleven enumerated examples of bargainable matters were plainly considered by Representative Heftel to constitute "matters affecting working conditions." There is no indication that any member of Congress had a different understanding of the meaning of that phrase.

limitation on wage bargaining is an instance of the general rule that employment conditions set by statute are not bargainable and that with very narrow exceptions statutory laws specifically prescribe the pay of federal employees.

Thus, the House Report cited by petitioner, Br. at 21, states that "[f]ederal pay will *continue* to be *set in accordance with the pay provisions of title 5*, and fringe benefits, including retirement, insurance, and leave, will *continue* to be *set by Congress*." H.R. Rep. No. 1403, *supra* at 12 (emphasis added). With even greater precision, the Report goes on to state that "[r]ates of overtime pay are not bargainable, *because they are specifically provided for by statute*." *Id.* at 44 (emphasis added).

Similarly, Representative Udall, after making the statement quoted in petitioner's brief at 22,[22] went on to explain with his next breath that "[a]ll these *major regulations about wages* and hours and retirement and benefits will *continue* to be *established by law through congressional action*." 124 Cong. Rec. 29182 (1978). (emphasis added).

Representative Ford, in another passage cited by petitioner, stated that bargaining was not to be permitted over "*matters that are governed by statute* (such as pay, money-related fringe benefits, retirement, and so forth)." *Id.* at 25721 (emphasis added).

So too, Representative Collins, who unsuccessfully proposed that the House narrow the scope of permissible bargaining, complained that "the House committee bill broadly defines scope of bargaining by saying that 'conditions of employment' excludes only matter relating to discrimination, political activities, and those few specifically *prescribed by law*—for example, pay and benefits." *Id.*

[22] *Viz.*, that there "is not really any argument in this bill or in this title about federal collective bargaining for wages and fringe benefits and retirement—the kinds of things that are giving us difficulty in the Postal Service today." 124 Cong. Rec. 29182 (1978).

at 29174 (emphasis added). To the same effect is the statement by Representative Clay, cited in petitioner's brief at 22, that from the outset the House bill had excluded bargaining over "that which is prohibited by law," such as pay. *Id.* at 24286.

Thus, fairly read in context, the statements on this subject by all the leading participants in the debates make two consistent points. *First*, that the Statute would continue prior law as to the scope of wage bargaining. And *second*, that the scope of such bargaining would be delimited by laws that specifically prescribe the pay of federal employees. In other words, these statements do not suggest that wages are not "conditions of employment;" rather, the statements refer to the exclusion from "conditions of employment" in 5 U.S.C. 7103(a)(14)(C) of "matters . . . specifically provided for by Federal statute."

What is more, even petitioner acknowledges that under the Statute *some* federal employees can bargain over wages.[23] And petitioner likewise concedes that at the

[23] As petitioner notes, Br. at 19, Section 704 of the CSRA provides that certain craft employees who bargained over compensation prior to the enactment of the Prevailing Rate Act, 5 U.S.C. 5341 *et seq.* (the so-called "grandfathered" Prevailing Rate employees) may continue to do so, "without regard to any provision of [the FSLMR Statute]." 5 U.S.C. 5343 note. Since petitioner acknowledges that Congress intended to permit at least *this* category of employees to bargain over compensation, petitioner is necessarily wrong in asserting that the legislative history stands for the proposition that no federal employees may do so.

Nor does any negative inference flow from the fact that Congress referred specifically to the wage bargaining rights of grandfathered Prevailing Rate employees but did not refer to the rights of other employees, such as those employed in the domestic dependent schools, who also had the right to negotiate over compensation. It was necessary for Congress to refer specifically to the Prevailing Rate employees, for two reasons. First, decisions of the Comptroller General that were rendered while the Statute was being drafted had held that grandfathered Prevailing Rate employees could not bargain on certain subjects, and, as Representative Ford

time Congress was debating the Statute, federal employees whose pay was not fixed by statute had been held generally to have the right to do so. *See* Pet. Br. at 24; and *see supra* at 14. It is therefore apparent that when the legislators made statements to the effect that federal employees could not bargain about compensation, they were referring to the situation that is *typical*, but *not universal*, in the federal sector, *viz.*, the situation where compensation is specifically fixed by federal statute.[24]

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put it, a specific provision overruling those decisions was "required" in order to "preserve the scope of collective bargaining heretofore enjoyed by [those employees]." 124 Cong. Rec. 25722 (1978). Second, but for the proviso in Section 704, all Prevailing Rate employees might be precluded from negotiating over pay on the ground that their pay was "specifically provided for by Federal statute," namely the Prevailing Rate Act. (Indeed, the FLRA has subsequently held that Section 7103(a)(14)(C) has precisely this effect on Prevailing Rate Act employees who did not bargain over wages prior to 1972. *Army and Air Force Exchange Service, Dallas, Texas and AFGE*, 32 F.L.R.A. 591, 597, 600 (1988) (separate opinion of Member McKee).)

In contrast, Congress had no reason to think that *non*-Prevailing Rate Act employees such as those involved in this case would lose their established bargaining rights in the absence of an explicit proviso, and there was accordingly no need for Congress to enact a proviso with respect to those employees.

Thus, the proper lesson to be drawn from Congress' action with respect to Prevailing Rate Act employees is that in the one situation where federal employees who had previously bargained over wages might have lost that bargaining right had the 1978 Congress not specifically acted to preserve it, Congress did so act. Petitioner has offered nothing to suggest why Congress would wish to destroy the wage bargaining rights of employees such as those involved in this case at the same time that the Legislature was acting to preserve (indeed, to restore) the bargaining rights of the Prevailing Rate Act employees just discussed. To the contrary, it was in this very context that Representative Ford stated: "Certainly, we should not now be narrowing the preexisting collective bargaining practices of *any* group of Federal employees." 124 Cong. Rec. 25722 (1978) (emphasis added).

[24] It must be recalled that there had been an effort in Congress to enact a system under which *all* federal employees would have

Thus, neither the statutory language nor the legislative history provide any basis for concluding that employees whose pay is not specifically set by statute, and who therefore had the right to bargain over compensation under the Executive Order, lost that right when the FSLMR Statute was enacted.

II. THE STATUTORY EXCLUSION OF BARGAINING OVER "THE BUDGET OF THE AGENCY" DOES NOT PRECLUDE BARGAINING OVER COMPENSATION PROPOSALS SUCH AS THOSE AT ISSUE HERE

In enacting the Statute Congress provided that a proposal concerning conditions of employment is not bargainable if the proposal would conflict with the "management rights" set out in 5 U.S.C. 7106. One of the rights so enumerated is the right of management "to determine the mission, budget, organization, number of employees, and internal security practices of the agency." 5 U.S.C. 7106(a)(1).

Petitioner maintains that respondent's compensation proposals would violate "management's right to set the budget." Pet. Br. at 27. Petitioner's theory is that any bargaining proposal, and not simply a wage proposal, is nonnegotiable under Section 7106(a)(1) if the proposal has any "significant"—*i.e.*, "more than . . . de minimis" —cost impact on the particular agency program involved. *See* Pet. Br. at 28-29.

The FLRA and the court below accepted this approach to a degree, but held that the test should be whether

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their pay set by a form of negotiation and arbitration. *See supra* at 15-16. Thus, there was every reason for supporters of the Statute to point out that as finally drafted, the bill would have no dramatic effect with respect to wage bargaining. This, rather than any intent to preclude such bargaining in every possible context, no doubt explains why supporters of the legislation thought it necessary to offer assurances on this subject.

adoption of the union's proposal would significantly increase the overall costs of the agency as a whole, rather than the costs of a particular program, and whether the union's proposal would have "compensating benefits" for the agency. Pet. App. 20a.

Although the FLRA's approach comes closer than petitioner's to capturing the congressional intent, we submit that respondent Fort Stewart Association of Educators is correct in stating that the most reasonable construction of the words Congress used is that a union cannot bargain about an agency's budget *as such*. To bargain about wages is not to bargain about the budget, any more than to bargain about safety and health, which has major cost consequences, is to bargain about the budget. And, to argue that there is some magical level (whether relatively high or relatively low) at which a wage proposal or a safety proposal becomes an effort "to determine the agency's budget" is to strain language beyond the breaking point.

As best we can determine, the concept of "budget" as a nonnegotiable matter goes back to Executive Order 10988 (1962), which provided that the obligation to bargain "shall not be construed to extend to such *areas of discretion and policy* as the mission of an agency, its budget, its organization and the assignment of personnel, or the technology of performing its work." Leg. Hist. 1214 (emphasis added). We submit that this is the sense of Section 7106(a)(1) as well, and that a wage proposal cannot be said to enter an "area of discretion and policy" merely because the raise proposed is, say, 10% rather than 1%.[25]

[25] An example involving a related aspect of Section 7106(a)(1) may help to make the point. That provision, in addition to referring to management's right to determine the budget, states that management has the right "to determine the . . . number of employees in the agency." Virtually any union proposal dealing with workload might potentially lead to the hiring of additional personnel, in which case the proposal would, by petitioner's reasoning, violate management's right to determine the number of employees. Yet, in a very small agency (or, under petitioner's approach, in a very small agency *program*), a union proposal calling for a small reduction in each employee's workload might not lead to additional hiring, because the aggregate reduction might be less than one man-year, while in an enormous agency or program the same proposed reduction might add up to a full man-year, such that the agency would proceed to hire an additional employee. On petitioner's theory, in the small agency the union's proposal would be negotiable, because it would not lead to any actual hiring, while in the large agency management could refuse to bargain. This makes no sense. The correct approach is to say that in neither case is the union seeking to bargain about "the number of employees in the agency;" rather, the union is seeking to bargain about workload.

The legislative history supports this construction by making it clear that Congress did not intend Section 7106 to be given a broad reach. Representative Udall, who authored the compromise language that was enacted as Section 7106, and whose views should, as petitioner acknowledges, "be accorded significant weight,"[26] stated that the provision "is . . . to be treated narrowly as an exception to the general obligation to bargain over conditions of employment." 124 Cong. Rec. 29183 (1978). Similarly, the Committee Report on the House bill that preceded the Udall compromise had stated that "section 7106 . . . [should] be read to favor collective bargaining whenever there is doubt as to the negotiability of a subject or a proposal," H.R. Rep. No. 1403, *supra* at 44; and Representative Ford, who together with Representatives Clay and Udall worked out the compromise language that was enacted,[27] stated that "[i]n agreeing to the

[26] Pet. Br. at 22, *citing Simpson v. United States*, 435 U.S. 6, 13 (1978). The Udall compromise added to the bill certain management rights that had not been included in the House bill as reported out of committee. *See, e.g.*, 124 Cong. Rec. 29183 (Representative Udall), 29198 (Representative Ford).

[27] *See* 124 Cong. Rec. 29197 for a discussion of the roles of Representatives Udall, Ford and Clay in this regard.

Udall compromise . . ., we fully intend that the committee's original position go unchanged and that this section be narrowly construed." 124 Cong. Rec. 29198 (1978). Even more to the point, Representative Clay declared that "it is essential that only those proposals that *directly and integrally* go to the specified management rights be barred from the negotiations." *Id.* at 29187 (emphasis added).

In view of this legislative history, it is highly unlikely that when Congress referred to the right of an agency to determine its budget, the Legislature's purpose was to preclude bargaining over each and every proposal that would involve significant costs. Such a purpose would be at odds with the Statute's basic theory. As Congress undoubtedly was aware, any meaningful process of collective bargaining, whether in the private or public sector, consists in large part of resolving the conflict between a union's desire to obtain greater benefits for the represented employees and management's desire to avoid the attendant costs. The genius of collective bargaining is its ability to produce "amicable settlements of [such] disputes," 5 U.S.C. 7101(a). When Congress declared in the FSLMR Statute that labor-management disputes should be resolved through collective bargaining, *see supra* at 10, there is no reason to think that what the Legislature had in mind was a stultified form of bargaining in which disputes about costs would not be determined *by* bargaining, but would instead determine whether there should even *be* bargaining.[28] And, had Congress wished to state that only low-cost proposals were negotiable, the Legislature doubtless

[28] In *Steelworkers v. Warrior & Gulf Co.*, 363 U.S. 574, 584-85 (1960), the Court recognized the realities of industrial relations in stating that a grievance of a type that is "grist in the mills of the arbitrators" should not be found to be non-arbitrable except on the basis of "the most forceful evidence of a purpose to exclude the claim from arbitration." Similarly here, competing claims about costs are "grist in the mills" of collective bargaining, and it should not lightly be assumed that Congress intended to remove such matters from the bargaining table.

would have done so directly, rather than in the roundabout fashion petitioner claims to discern in the budget provision.

For these reasons, the budget proviso should be read to apply only to proposals that seek to bargain about the agency's budget as such. This case involves no such proposals.[29]

III. THE ASSOCIATION'S PROPOSALS ARE NOT INCONSISTENT WITH ANY REGULATION THAT IS SUPPORTED BY A COMPELLING NEED

Petitioner's final contention is that certain of the Association's proposals deal with matters covered by an agency regulation for which there is a "compelling need," and that the proposals are therefore removed (at least in part) from bargaining by 5 U.S.C. 7117(a)(2). That contention ignores Congress' intent that "compelling need" be literally construed as a very narrow exception to collective bargaining.

Congress was aware that if Section 7117(a)(2) were given undue breadth, the provision could undermine the entire statutory scheme, because on *any* issue that may

[29] If the construction just advanced were to be rejected, it would then become necessary to determine what level of cost renders a proposal nonbargainable under the budget proviso. On that point, as the brief of the respondent Association demonstrates, the language of Section 7106(a)(1), which refers to "*determin*[*ing*]" the budget "*of the agency*," cannot by any stretch reach proposals that would not produce an unavoidable increase in the "*budget*" (and not just in its *costs*) of the "*agency*" (and certainly not just the costs of a particular *program*).

We agree with the Association's demonstration that on the facts presented here petitioner has not made such a showing. Indeed, even the contention on which petitioner ultimately rests—*viz.*, that the Association's proposals would "result in an unavoidable and significant increase in the cost of operating the Fort Stewart Schools," Pet. Br. at 15—is unsupported by the facts, as the Association's brief demonstrates.

arise affecting conditions of employment an agency may opt for the course of stating its position in the form of a regulation and may assert that its regulation meets a "compelling need." Lest this exception swallow Congress' rule favoring collective bargaining, *see supra* at 10, it is necessary, as the House Report emphasizes, that the "compelling need" exception be construed literally, as limited to a "*demonstrated*, and *justified*, and *overriding* need," H.R. Rep. No. 1403, *supra* at 51 (emphasis added).[30] The FLRA has properly carried out that congressional intent by defining "compelling need" as that which is "essential, as distinguished from helpful or desirable, to the accomplishment of the mission or the execution of functions of the agency." 5 U.S.C. 2424.11 (a). By the express mandate of Section 7117(a)(2), whether there is a compelling need is to be "determined under [those] regulations."

Thus, it is plainly not enough for petitioner here to show that its regulation is reasonable or even desirable. After all, under the scheme of the Statute it is the role of the bargaining process and, if necessary, the Federal Services Impasse Panel, to decide whether labor's position or that of management should prevail. Only in an extraordinary case should management's position, even if embodied in an agency regulation, be deemed so "compelling" as to preclude resort to those processes. We agree with respondent Association's detailed showing that this is not such a case.

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[30] The Report was referring to a provision that would have allowed bargaining over *government-wide* regulations that lacked a "compelling need." The Udall compromise moved the "compelling need" test to the context of agency-level regulations, and provided that matters contained in government-wide regulations are outside the scope of bargaining even in the absence of a compelling need. *See* 5 U.S.C. 7117(a)(1). But there is no reason to think that the meaning of the words "compelling need" was changed when the words were made applicable to agency regulations rather than government-wide regulations.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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